

Mental Illness in the Workplace after Sutton v. United Air Lines

Randal I. Goldstein

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NOTE

MENTAL ILLNESS IN THE WORKPLACE AFTER *SUTTON V. UNITED AIR LINES*[†]

Randal I. Goldstein^{††}

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[†] 527 U.S. 471 (1999).

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Employees with mental illnesses have had difficulty obtaining relief under the Americans with Disabilities Act of 1990 (ADA), which was primarily intended by Congress to protect workers with physical impairments. An individual is "disabled" and thus shielded from discrimination by the ADA if she demonstrates (1) that she suffers from "a physical or mental impairment that substantially limits" a "major life activity," (2) a "record of" suffering from such an impairment, or (3) a perception by her employer that she suffers from such an impairment.

*The author argues that this three-pronged definition of disability presents unique problems for plaintiffs afflicted with mental illnesses, as opposed to physical impairments. First, mental illnesses are difficult to diagnose and are not usually readily apparent. Second, because mental illnesses frequently manifest themselves through either spotty attendance at work or difficulty coping with stress, mentally ill plaintiffs are often judged to be "not otherwise qualified" for their jobs. However, under *Sutton v. United Air Lines, Inc.*, plaintiffs who "mitigate the effects" of their impairments through medication are denied ADA relief. The author further notes that this Supreme Court ruling should lead many plaintiffs to attempt to establish a disability under the second and third prongs. Yet these plaintiffs face a difficult evidentiary burden that requires them to prove that their employer believed they suffered from a specific, ADA-covered disability.*

The author proposes to address these problems through an alternative statutory scheme that would maintain a stringent burden of proof for plaintiffs seeking workplace accommodations for their impairments, as compared to those plaintiffs who only assert that they suffered an adverse employment action based on the "myths, fears, or stereotypes" associated with an actual or perceived impairment.

INTRODUCTION

Congress drafted the Americans with Disabilities Act of 1990¹ (ADA) with physically impaired individuals in mind, but it applied the statute to the mentally ill as well.² Thus, the courts have been saddled with the task of attempting to shoehorn mental illness cases into an inapt statutory scheme. In struggling to balance the statutory requirements of the ADA with the realities of the workplace, courts have produced inconsistent results. Consequently, mentally ill workers have found little protection under the ADA.

In general, actions by mentally ill individuals under the employment provisions of the ADA³ fail due to the litigants' inability to satisfy the Act's definition of disability.⁴ In three 1999 decisions—*Sutton v. United Air Lines, Inc.*;⁵ *Murphy v. United Parcel Service, Inc.*;⁶ and *Albertson's, Inc. v. Kirkingburg*⁷—the United States Supreme Court provided employers with a valuable tool to combat ADA claims, thereby complicating the existing obstacles facing mentally ill plaintiffs and leaving the statute largely unworkable for them. In each case, the Court held that mitigating measures, such as medication, must be considered when evaluating whether an individual is "disabled" under the ADA.⁸

Initially, this Note analyzes the shortcomings of the Act as applied to the mentally ill and the resulting judicial confusion. It will also attempt to identify the emerging trends in ADA mental illness cases following *Sutton*. First, following the Court's mitigating measures rulings, lower courts will more carefully scrutinize the effectiveness of psychotropic drugs and whether the side effects of these medications are themselves disabling.⁹ Second, many claimants who may have previously been considered disabled will now fall outside the statutory coverage because their medications effectively control their illnesses. These individuals will increasingly argue that they have been victims

1 42 U.S.C. §§ 12101-12213 (1994).

2 See *infra* notes 123-34 and accompanying text.

3 Title I of the ADA, which is the focus of this Note, addresses disability discrimination in the employment context. See 42 U.S.C. §§ 12111-12117.

4 Although many scholars have examined the shortcomings of the ADA's definition of disability, see, e.g., Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 431-36 (1997), and the general failures of plaintiffs under the Act, see, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999), a detailed analysis of the ADA's application to mental illness serves at least two important purposes: it (1) demonstrates the unique problems mentally ill claimants face, and (2) clearly exposes the deficiencies of the statute.

5 527 U.S. 471 (1999). *Sutton* was the lead case of the three decisions the Supreme Court rendered on June 22, 1999 and will therefore be the focus of this discussion.

6 527 U.S. 516 (1999).

7 527 U.S. 555 (1999).

8 See *Albertson's*, 527 U.S. at 565-66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482.

9 See discussion *infra* Part IV.A.

of stereotypical attitudes toward disability, and as such, will assert claims under the ADA's alternative definitions of disability: having a "record of" a disability¹⁰ or being "regarded as" disabled.¹¹ Third, although mentally ill litigants often argue that their disabilities resulted from a "substantial limitation" in the "major life activity" of working,¹² the *Sutton* Court's suspicion of such a strategy¹³ may necessitate that these litigants assert claims based on other major life activities.¹⁴ Finally, *Sutton* will not only alter the focus of many ADA disputes, but will engender added inconsistencies in the application of the statute in mental illness cases.

Part I of this Note briefly describes the relevant statutory provisions of the ADA and the attendant administrative regulations. Part II analyzes the Court's decisions in *Sutton*, *Murphy*, and *Albertson's*. Part III discusses the common problems mentally ill individuals encounter in ADA cases and in the workplace generally. Part IV examines, through a discussion of recent judicial decisions, three prominent issues that have surfaced in the wake of *Sutton* and the trends that are likely to appear in mental illness cases. Finally, Part V proposes an amended statutory scheme for Title I of the ADA that aims to incorporate the practical employer concerns underlying *Sutton* without sacrificing the ADA's indictment of discriminatory workplace decision making. This amended statute protects mentally ill workers by providing separate standards for individuals asserting an "actual disability" and those claiming that an employer discriminated against them based on stereotypes of disability.

The ADA is a confusing and frustrating piece of legislation. Congress would certainly be warranted in discarding the entire statute and starting afresh. However, this Note suggests only a partial rewording—a narrow, but important revision of the existing definition of disability that attempts to embrace a middle ground between the disability rights community and the management bar. On the one hand, the proposal retains the current, strict formulation to the extent that the definition of disability operates to filter unfounded claims for employment accommodations. On the other hand, when a worker does not demand an accommodation, the revised definition is designed to break down barriers to employment. Ideally, then, a mentally ill employee who can "do the job" will be unencumbered by stere-

¹⁰ See 42 U.S.C. § 12102(2)(B) (1994).

¹¹ See *id.* § 12102(2)(C); discussion *infra* Part IV.B.

¹² The ADA requires that claimants be "substantially limit[ed]" in "one or more of the[ir] major life activities" in order to establish disabled status. 42 U.S.C. § 12102(2)(A); see also *infra* Part I.A.

¹³ See *Sutton*, 527 U.S. at 491-92.

¹⁴ See discussion *infra* Part IV.C.

otypical attitudes towards disability and her employer will not face additional costs.

I

THE RELEVANT STATUTORY PROVISIONS

In enacting the ADA, Congress declared that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."¹⁵ Congress intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁶

The ADA makes it unlawful for covered employers¹⁷ to "discriminate against a qualified individual with a disability" with regard to job applications, hiring, discharge, or other conditions of employment.¹⁸ A "qualified individual with a disability" is "an individual with a disability who . . . can perform the essential functions of the employment position"¹⁹ with or without "reasonable accommodation."²⁰ An employer discriminates if it fails to reasonably accommodate "the known physical or mental limitations of an otherwise qualified individual with a disability."²¹

Congress adopted the ADA's definition of disability from the Rehabilitation Act of 1973,²² which forbids discrimination against individuals with disabilities by any federal agency or any program receiving federal funds.²³ The Rehabilitation Act also requires that government agencies submit affirmative action plans for the hiring of disabled employees²⁴ and that federal contracts exceeding \$10,000

¹⁵ 42 U.S.C. § 12101(a)(7).

¹⁶ *Id.* § 12101(b)(1).

¹⁷ The statute uses the term "covered entity," *id.* § 12112(a), and refers to any employer with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," *id.* § 12111(5)(A).

¹⁸ *Id.* § 12112(a).

¹⁹ *Id.* § 12111(8).

²⁰ The issue of what constitutes a reasonable accommodation, in the realm of both physical and mental disabilities, has been the subject of much debate. This Note will not provide an in-depth analysis of the issue, but will refer to it from time to time. For a discussion of one approach to the formulation of reasonable accommodations for the mentally ill that views the provision of accommodations "as an ongoing process, rather than as a one-time solution," see Deborah Zuckerman, *Reasonable Accommodations for People with Mental Illness Under the ADA*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 311 (1993).

²¹ 42 U.S.C. § 12112(b)(5)(A).

²² See *id.* § 12201(a); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

²³ 29 U.S.C. § 794(a) (1994).

²⁴ *Id.* § 791(b).

contain provisions requiring the contractor to take affirmative action to hire disabled workers.²⁵

The ADA defines "disability" as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.²⁶

A great deal of ADA litigation concerns whether or not an individual can be classified as disabled under the statutory definition.²⁷

A. The First Prong: Actual Disability

The Supreme Court has explained that the determination of whether an individual is disabled requires a three-step inquiry.²⁸ First, does the individual suffer from an impairment?²⁹ Second, has the individual identified a major life activity affected by the impairment?³⁰ Third, does the given "impairment substantially limit[] the major life activity?"³¹ Each of these terms—"impairment," "major life activity," and "substantially limits"—requires further explanation.³²

1. *Impairment*

Congress granted the Equal Employment Opportunity Commission (EEOC or "Commission") authority to issue regulations implementing the employment provisions of Title I of the ADA.³³ The EEOC regulations define a "mental impairment" as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."³⁴ In its 1997 *EEOC Enforcement Guidance: Psychiatric Disabilities*

²⁵ *Id.* § 793(a).

²⁶ 42 U.S.C. § 12102(2).

²⁷ See Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997).

²⁸ See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

²⁹ See *id.*

³⁰ See *id.*

³¹ *Id.*

³² As one commentator has noted: "No ADA definition or term has become more important for understanding the antidiscrimination rights of persons with mental disabilities than the definition of mental disability itself." JOHN W. PARRY, AM. BAR ASS'N, *MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* 9 (2d ed. 1997).

³³ 42 U.S.C. § 12116 (1994). In addition, the Commission "may render technical assistance to individuals and institutions that have rights or duties" under Title I. *Id.* § 12206(c)(1). In 1992, the EEOC published its *Technical Assistance Manual*. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT* (1992).

³⁴ 29 C.F.R. § 1630.2(h)(2) (2000). Although the Court's recent decisions will impact individuals suffering from each of these impairments and, in particular, the learning disabled, the discussion in this Note is limited to emotional or mental illness.

and the Americans with Disabilities Act,³⁵ the Commission suggested that courts and attorneys use the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) as a reference in mental illness cases.³⁶ From the DSM-IV, the Commission gleaned a list of mental or emotional illnesses that it considered ADA "impairments." These "include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders."³⁷

2. Major Life Activities

According to the initial EEOC regulations concerning the ADA, major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."³⁸ However, in its subsequent *EEOC Psychiatric Guidance*, the Commission suggested an expanded list of major life activities. The additional activities include thinking, concentrating, interacting with others, and sleeping.³⁹

3. Substantially Limits

Regarding the "substantially limits" requirement, the EEOC states the following:

The term *substantially limits* means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁴⁰

In order to determine whether an individual is substantially limited, a court should consider the following, on a case-by-case basis:⁴¹ the nature and severity of the impairment, the duration of the impairment,

³⁵ *EEOC Enforcement Guidance: Psychiatric Disabilities and the Americans with Disabilities Act*, 3 EEOC Compl. Man. (BNA) No. 224, at N:2331 (May 1997) [hereinafter *EEOC Psychiatric Guidance*].

³⁶ *Id.* at N:2331; AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994). Courts addressing mental illness issues in the employment context often cite the DSM-IV. *E.g.*, *Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 130 (D.N.H. 1995) (addressing claim under the Rehabilitation Act).

³⁷ *EEOC Psychiatric Guidance*, *supra* note 35, at N:2331.

³⁸ 29 C.F.R. § 1630.2(i). This is not an exhaustive list. *Id.*

³⁹ See *EEOC Psychiatric Guidance*, *supra* note 35, at N:2332.

⁴⁰ 29 C.F.R. § 1630.2(j)(1).

⁴¹ See 29 C.F.R. pt. 1630, app. § 1630.2(j).

and, the permanent impact of the impairment.⁴² In addition, the EEOC states that claimants should only raise the major life activity of working as a last resort.⁴³ Nonetheless, most mentally ill plaintiffs assert "working" as the major life activity in which they are substantially limited.⁴⁴

The EEOC proposes a separate and more detailed analysis for those cases concerning the major life activity of working. In order to be substantially limited in working, one must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."⁴⁵ Although an individual need not be completely unable to work, one is not substantially limited in working if he is only unable to perform a single job or a narrow range of jobs.⁴⁶ This class-of-jobs directive has caused innumerable problems for plaintiffs in ADA litigation.⁴⁷ As one authority warned, the courts have been apt to find that an employee who is capable of performing "any job other than his own" is not disabled.⁴⁸

⁴² See 29 C.F.R. § 1630.2(j) (2). Courts disagree as to the exact length of illness necessary to invoke the ADA. One authority stated that although courts have required anywhere between two and twelve months of symptoms, "a safe rule of thumb is 90 days." *Employment Discrimination—Disability: Speakers at Law Conference on ADA Discuss Ways to Avoid Summary Judgment*, 67 U.S.L.W. 2254 (1998) [hereinafter *Avoiding Summary Judgment*] (quoting David Fram, director of ADA and EEO services at the National Employment Law Institute); cf. *Ogborn v. United Food & Comm. Workers*, No. 98C 4623, 2000 WL 1409855, at *7 (N.D. Ill. Sept. 25, 2000) (holding that two months of severe depression did not establish disability).

⁴³ See 29 C.F.R. pt. 1630, app. § 1630.2(j) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.").

⁴⁴ See Sidney R. Steinberg, *Sup. Ct. Defines "Disability" Under Americans with Disabilities Act*, *ANDREWS EMP. LITIG. REP.*, July 7, 1999, at 3 (stating that "'working' seems to be the 'major life activity' most often cited in claims brought under the Act").

⁴⁵ 29 C.F.R. § 1630.2(j) (3).

⁴⁶ 29 C.F.R. pt. 1630, app. § 1630.2(j). In addition, the EEOC recommends that courts consider: (1) the geographical area to which the individual has access; (2) the number and type of jobs in the geographical area utilizing similar training and skills from which the individual is disqualified because of the impairment ("class of jobs"); and (3) the number and type of jobs in the geographical area not utilizing similar training and skills from which the individual is disqualified because of the impairment ("broad range of jobs"). *Id.* § 1630(j) (3) (ii) (A)-(C).

⁴⁷ See R. Bales, *Once is Enough: Evaluating When a Person is Substantially Limited in Her Ability to Work*, 11 *HOFSTRA LAB. L.J.* 203, 232-33 (1993).

⁴⁸ *Avoiding Summary Judgment*, *supra* note 42, at 2254 (emphasis added) (recounting statement of David Fram, director of ADA and EEO services at the National Employment Law Institute).

B. The "Record of" and "Regarded as" Prongs

In 1974, Congress amended the Rehabilitation Act's definition of "handicapped individual,"⁴⁹ introducing two alternative criteria for coverage which were later adopted by the ADA's drafters:⁵⁰ having a "record of" a substantially limiting impairment⁵¹ and being "regarded as" having a substantially limiting impairment.⁵² In essence, these prongs "indicate that disability can be socially constructed."⁵³

1. *The Second Prong: "Record of" a Disability*

The "record of" prong of the definition prevents discrimination against an individual who "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."⁵⁴ Congress thus intended to protect individuals who have recovered from disabling impairments, but who nonetheless face the specter of discrimination due to antiquated stereotypes about those impairments.⁵⁵

In *School Board of Nassau County v. Arline*,⁵⁶ the Supreme Court decided a Rehabilitation Act case in favor of a plaintiff with a "record

⁴⁹ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 706(8)(B) (1994)). See generally Burgdorf, *supra* note 4, at 431-36 (discussing the history and impact of the 1974 amendments to the Rehabilitation Act).

In 1992, Congress replaced the phrase "handicapped" in the Rehabilitation Act with "disabled." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §§ 102(f)(1)(A), (f)(2)(B), (f)(3), (p), 105 Stat. 4344, 4348, 4349, 4356-58 (codified as amended at 29 U.S.C. § 706(8) (1994)).

⁵⁰ See S. REP. NO. 101-116, at 23 (1989); see also Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1427 (1999) (noting that the drafters of the ADA "found the previous definition in the Rehabilitation Act to be unworkable").

⁵¹ 42 U.S.C. § 12102(2)(B) (1994).

⁵² *Id.* § 12102(2)(C).

⁵³ Eichhorn, *supra* note 50, at 1432.

⁵⁴ 29 C.F.R. § 1630.2(k) (2000). It is essential that the record relied upon by the employer indicates that the individual "has or has had a substantially limiting impairment." *Id.* pt. 1630, app. § 1630.2(k).

⁵⁵ See S. REP. NO. 93-1297, at 38-39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6389 (noting that the "record of" prong, added as part of the Rehabilitation Act Amendments of 1974, covers "persons who have recovered—in whole or in part—from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer"); *id.* at 50, reprinted in 1974 U.S.C.C.A.N. 6373, 6400 (noting that the "record of" and "regarded as" prongs address the problem that "the American people are simply unfamiliar with and insensitive to difficulties confront[ing] individuals with handicaps"); see also Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (explaining that the "record of" and "regarded as" prongs were added to reflect "Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws'" (quoting S. REP. NO. 93-1297, at 50, reprinted in 1974 U.S.C.C.A.N. 6373, 6400)).

⁵⁶ 480 U.S. 273 (1987), superseded by statute as stated in *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994).

of" a disability.⁵⁷ Addressing a claim by a teacher whose school had terminated her for fear that her tuberculosis was contagious, the Court ruled that the teacher's previous hospitalization established a record of a substantially limiting impairment.⁵⁸ The Court denounced employers' "reflexive reactions"⁵⁹ to individuals with disabilities and, in an oft-cited discussion of the legislative history surrounding the Rehabilitation Act Amendments of 1974, stated: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."⁶⁰

2. *The Third Prong: "Regarded as" Having a Disability*

When Congress implemented the "regarded as" portion of the ADA, it sought guidance in the Supreme Court's *Arline* ruling.⁶¹ As with the "record of" prong, Congress included the "regarded as" prong to protect an individual "who is rejected from a job because of the myths, fears and stereotypes associated with disabilities," whether or not the person would be considered disabled under the first prong of the definition.⁶² As such, the third prong "ensure[s] that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions."⁶³

According to the EEOC, there are three ways an individual may be "regarded as" disabled.⁶⁴ First, an individual might have an impairment that is not substantially limiting, but that is perceived as substantially limiting by his employer.⁶⁵ Second, an individual might have "an impairment which is only substantially limiting because of the attitudes of others towards the impairment."⁶⁶ Finally, an employee

⁵⁷ *Id.* at 281.

⁵⁸ *Id.* The school board had argued that *Arline's* history was irrelevant because the board had terminated her due to the "threat that her relapses of tuberculosis posed to the health of others." *Id.*

⁵⁹ *Id.* at 285.

⁶⁰ *Id.* at 284.

⁶¹ See H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452-53.

⁶² *Id.* at 30, reprinted in 1990 U.S.C.C.A.N. 445, 453.

⁶³ S. REP. NO. 101-116, at 24 (1989).

⁶⁴ 29 C.F.R. pt. 1630, app. § 1630.2(l) (2000) (elaborating on 29 C.F.R. § 1630.2(l)). The EEOC adopted these three formulations of the "regarded as" prong directly from the legislative history. See H.R. REP. NO. 101-485, pt. 3, at 29, reprinted in 1990 U.S.C.C.A.N. 445, 452; S. REP. NO. 101-116, at 23.

⁶⁵ H.R. REP. NO. 101-485, pt. 3, at 29; S. REP. NO. 101-116, at 23.

⁶⁶ The *Sutton* Court conspicuously omitted this second definition in its discussion of the "regarded as" prong. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) ("There are two apparent ways in which individuals may fall within this statutory definition . . ."). For further discussion of this issue, see *infra* notes 264-81 and accompanying text.

might have no impairment at all but nevertheless be regarded by the employer as having a substantially limiting impairment.⁶⁷

II

THE SUPREME COURT'S MITIGATING MEASURES RULINGS

The Court's recent decisions have significantly narrowed employers' exposure to liability under the ADA by permitting courts to consider mitigating measures when making individual disability determinations. Prior to these decisions, the EEOC had declared that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistance or prosthetic devices."⁶⁸ Eight of the nine Circuit Courts of Appeals that initially addressed the issue adopted the EEOC's position.⁶⁹ When the Tenth Circuit departed from this trend,⁷⁰ the Supreme Court granted certiorari on the mitigating measures question,⁷¹ and affirmed the Tenth Circuit's decision.⁷² This Part examines the three Court decisions that set forth the mitigating measures standard: *Sutton v. United Air Lines, Inc.*,⁷³ *Murphy v. United Parcel Service, Inc.*,⁷⁴ and *Albertson's, Inc. v. Kirkingburg*.⁷⁵

A. *Sutton v. United Air Lines, Inc.*

Sutton v. United Air Lines, Inc.,⁷⁶ the lead case of the trilogy, contained the most detailed inquiry into the mitigating measures issue.⁷⁷ *Sutton* involved the claims of twin sisters who suffered from severe myopia and were, as a result of their diminished eyesight, denied employment as commercial pilots.⁷⁸ With corrective lenses, each of the petitioners had 20/20 vision or better.⁷⁹ They also met the basic age, educational, and FAA certification specifications.⁸⁰ However, United did not consider the petitioners for employment because, without

⁶⁷ H.R. REP. NO. 101-485, pt. 3, at 29; S. REP. NO. 101-116, at 23.

⁶⁸ 29 C.F.R. pt. 1630, app. § 1630.2(j).

⁶⁹ *Sutton*, 527 U.S. at 495-96 & n.1 (Stevens, J., dissenting) (noting that the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts had construed the ADA as defining disability "without regard to ameliorative measures").

⁷⁰ See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999).

⁷¹ *Sutton*, 527 U.S. at 476-77.

⁷² *Id.* at 488-89.

⁷³ 527 U.S. 471 (1999).

⁷⁴ 527 U.S. 516 (1999).

⁷⁵ 527 U.S. 555 (1999).

⁷⁶ 527 U.S. 471 (1999).

⁷⁷ See *id.* at 475-76.

⁷⁸ *Id.*

⁷⁹ *Id.* at 475.

⁸⁰ *Id.* at 475-76.

their corrective lenses, they did not meet the employer's minimum vision requirement.⁸¹ The Court ruled in United's favor, holding that the effects of corrective or mitigating measures, both positive *and* negative, should be considered in determining whether an individual is substantially limited in a major life activity, and thus disabled under the ADA.⁸²

The Court's analysis began with a discussion of the plain meaning of the statute. Since the words "substantially limits" appear in the present indicative form, Justice O'Connor, writing for the majority, concluded that an individual must be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁸³ Thus, if a person's impairment is corrected by mitigating measures, that impairment is not substantially limiting.⁸⁴

The Court maintained that if in each case it ignored the mitigating measures the plaintiff used, it would eviscerate the legislature's directive that "disabilities be evaluated 'with respect to an individual.'"⁸⁵ According to the Court, a contrary holding would require lower courts "to make a disability determination based on general information about how an uncorrected impairment usually affects individuals," rather than how the impairment actually limits the individual in question.⁸⁶ The Court buttressed this reasoning by observing that if lower courts did adhere to the EEOC approach, they could not consider the negative side effects of some mitigating measures, in particular, medications.⁸⁷

Ultimately, the Court preyed on the particular facts of the case.⁸⁸ The ADA aimed to protect people with impairments that have been

⁸¹ *Id.* at 476.

⁸² *Id.* at 482.

⁸³ *Id.*

⁸⁴ *Id.* at 482-83.

⁸⁵ *Id.* at 483 (citing 42 U.S.C. § 12102(2) (1994)). Ironically, plaintiffs have often used the "individualized inquiry" theory against employers they accuse of making employment decisions based on stereotypical notions of disabled persons. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); Steinberg, *supra* note 44, at 4; cf. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? and What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 152 (2000) (arguing that the "individualized inquiry" is useful for determining whether a person is qualified for a position—including what, if any, reasonable accommodations are necessary—but not for determining whether an individual is covered by the law).

⁸⁶ *Sutton*, 524 U.S. at 483.

⁸⁷ *Id.* at 484.

⁸⁸ See Thomas G. Hungar & Eugene Scalia, *Limiting ADA to the Disabled*, 157 N.J. L.J. 714 (1999) ("These cases demonstrate how the facts of a particular case can influence the development of legal doctrine."); Stuart Taylor, Jr., *Conservatism in Question: ADA Decisions Show Gray Area Among Justices' Allegiances*, TEX. LAW., July 19, 1999, at 34 (noting that the Court chose three cases that "involved employers who were sued not for anything smacking of irrational prejudice" and that this decision reflects the Court's method "of separating valid from invalid claims at reasonable cost").

the basis for stereotyping and unequal treatment.⁸⁹ Outside of the elementary school playground, however, people with poor vision have not been victims of discrimination.⁹⁰ From this premise, the Court delved into the first section of the statute and observed that Congress found "some 43,000,000 Americans have one or more physical or mental disabilities."⁹¹ If Congress had intended to include those citizens whose impairments are controlled by mitigating measures, the Court concluded, it would have cited a significantly higher number.⁹² In fact, more than 100 million Americans require corrective lenses and 50 million people suffer from high blood pressure.⁹³

The Court also rejected the sisters' "regarded as" claim—that the airline perceived them as substantially limited in the major life activity of working.⁹⁴ The Court adhered to the EEOC's analysis⁹⁵ on working as a major life activity and noted: "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs."⁹⁶ The sisters' "regarded as" claim failed because, even if United regarded them as precluded from a position as a global airline pilot due to their poor vision, that did not demonstrate that the airline regarded them as substantially limited in working. In fact, the Court noted, the petitioners were qualified for many other pilot jobs.⁹⁷ The Court thus declared:

[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.⁹⁸

⁸⁹ See *supra* Part I.B.

⁹⁰ See *Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring) (stating that "persons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination").

⁹¹ *Id.* at 484 (quoting 42 U.S.C. § 12101(a)(1) (1994)).

⁹² *Id.* at 487.

⁹³ *Id.*

⁹⁴ *Id.* at 490.

⁹⁵ See 29 C.F.R. § 1630.2(j)(3) (2000).

⁹⁶ *Sutton*, 527 U.S. at 492.

⁹⁷ *Id.* at 493.

⁹⁸ *Id.* at 490-91.

B. *Murphy v. United Parcel Service, Inc.*

In *Murphy v. United Parcel Service, Inc.*,⁹⁹ the Court applied its mitigating measures analysis to a United Parcel Service (UPS) employee who suffered from high blood pressure.¹⁰⁰ In order to drive UPS vehicles, the petitioner needed to satisfy a Department of Transportation (DOT) health requirement that he not suffer from high blood pressure.¹⁰¹ Although Murphy's blood pressure was well above DOT limits, he was erroneously hired.¹⁰² When UPS discovered the error, it terminated the petitioner.¹⁰³

Although Murphy was diagnosed with hypertension in childhood, his physician testified that Murphy "can function normally and can engage in activities that other persons normally do."¹⁰⁴ Reiterating *Sutton's* reasoning, the Court held that the petitioner was not disabled under the ADA.¹⁰⁵ The Court also determined that the petitioner was not "regarded as" disabled because he did not introduce evidence that UPS regarded him as unable to perform other mechanic jobs—those that would not require him to drive commercial vehicles.¹⁰⁶

C. *Albertson's, Inc. v. Kirkingburg*

*Albertson's, Inc. v. Kirkingburg*¹⁰⁷ involved an employer who terminated a truck driver with more than ten years of driving experience because he did not meet the Department of Transportation's vision requirements.¹⁰⁸ Hallie Kirkingburg suffered from amblyopia, a condition that left him essentially blind in one eye.¹⁰⁹ The Ninth Circuit ruled that Kirkingburg was disabled, basing its decision on the EEOC standard for "substantially limits" that "requires a 'significant restrict[ion]' in an individual's manner of performing a major life activity" as compared to that of the average citizen.¹¹⁰

The Supreme Court rejected the Ninth Circuit's reasoning, stating that the lower court was "willing to settle for a mere difference" rather than a truly "significant restriction."¹¹¹ In the most striking portion of the opinion, the Court maintained that the circuit court's "disability" analysis failed to "take account of the individual's ability to

⁹⁹ 527 U.S. 516 (1999).

¹⁰⁰ *Id.* at 519.

¹⁰¹ *Id.*

¹⁰² *Id.* at 520.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 519 (internal quotation marks omitted).

¹⁰⁵ *Id.* at 521, 525.

¹⁰⁶ *Id.* at 524-25.

¹⁰⁷ 527 U.S. 555 (1999).

¹⁰⁸ *Id.* at 558, 560.

¹⁰⁹ *See id.* at 559.

¹¹⁰ *Id.* at 564-65.

¹¹¹ *Id.*

compensate for the impairment.”¹¹² According to the record, Kirkingburg’s “brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability.”¹¹³ The Court likened this situation, in which “the body’s own systems” enable the individual to compensate for a substantial limitation, to those in which an individual controls an impairment with medication.¹¹⁴ The Court stressed that it was engaged in a case-by-case inquiry.¹¹⁵ Hence, although one with monocular vision would ordinarily be disabled, certain individuals, like Kirkingburg, might fall outside the statutory definition.¹¹⁶

III

THE MENTALLY ILL IN THE WORKPLACE AND THE ADA

Congress has recognized that discrimination against the disabled “often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.”¹¹⁷ Although modern society has begun to look beyond these stereotypic attitudes with regard to the physically disabled, those suffering from mental illness are consistently stigmatized, even within the disabled community.¹¹⁸ As one scholar noted: “Bias against the mentally ill is one of the last invisible and socially acceptable forms of discrimination, perpetuated by our use of uncritically accepted ‘common sense’ and stereotype-based reasoning about mental illness”¹¹⁹ Still, more than one in five American adults have a diagnosable mental disorder in a given year.¹²⁰

Employees suffering from mental illness are a constant concern for employers. Between July 26, 1992 and September 30, 1999, ADA charges based on mental or emotional impairments have represented

¹¹² *Id.* at 565.

¹¹³ *Id.*

¹¹⁴ *Id.* at 565-66.

¹¹⁵ *Id.* at 566.

¹¹⁶ *Id.* at 567.

¹¹⁷ H.R. REP. NO. 101-485, pt. 2, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 311.

¹¹⁸ See Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW 221, 224 (Richard J. Bonnie & John Monahan eds., 1997). In a 1999 article, Lisa Eichhorn provides a lengthy description of the disabilities movement as background to an interesting criticism of the ADA’s definition of “disability.” Eichhorn, *supra* note 50, at 1409-19. However, nowhere in her recounting of the movement’s birth and expansion does the author mention the mentally ill. See *id.*

¹¹⁹ Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 702-03 (1997).

¹²⁰ Laura Lee Hall, *Making the ADA Work for People with Psychiatric Disabilities*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW, *supra* note 118, at 241, 248 (citing 1993 National Institute of Mental Health statistics).

an increasing percentage of all claims filed with the EEOC.¹²¹ In 1998 and 1999, individuals brought claims based on mental impairments more often than any other type of impairment.¹²²

A. Societal Hurdles: Contrasting Mental and Physical Disabilities

The difficulties facing mentally ill individuals who assert ADA claims grow from longstanding societal misconceptions and the inherent inconsistencies between the ADA and the nature of mental illness itself. An underlying presumption of the ADA is the belief that disabled individuals can "do the job." In many respects, however, it appears Congress did not apply this presumption to the mentally ill.¹²³

Early advocates of the ADA were "by and large, highly educated and disciplined professionals with good self-esteem and assertiveness skills. They were people who had risen above the societal and medical

¹²¹ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CUMULATIVE ADA CHARGE DATA—RECEIPTS: JULY 26, 1992–SEPT. 30, 1999, at <http://www.eeoc.gov/stats/ada-receipts.html> (last modified Jan. 12, 2000).

¹²² See *id.* Because the EEOC website cited herein does not include a separate percentage for mental illness charges generally, the author added together the statistics for the separate categories of mental illness (Anxiety Disorder, Cumulative Trauma Disorder, Depression, Manic Depressive Disorder, Other Psychological Disorder, and Schizophrenia) and determined that they constitute a greater percentage of claims than any other category. The second-most common category of claims is Orthopedic and Structural Impairments of the Back.

Although specific statistics do not exist for mental impairment cases, ADA claimants are, in general, rarely successful. According to Professor Ruth Colker's examination of ADA cases in federal courts between 1992 and 1998, employers won favorable court decisions in more than 93% of those cases decided on the merits at the trial court level, and prevailed in 84% of the cases that were appealed. See Colker, *supra* note 4, at 100-03. Colker attributes these staggering results, in large part, to the fact that trial courts abuse the summary judgment device in ADA cases. See *id.* at 110. In particular, Colker states that courts have been substituting their own judgment for that of juries on purely factual questions regarding what constitutes a "disability," who is "qualified," and what job functions are "essential." See *id.* at 110-115; see also Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1360 (1999) ("[E]mployees claiming discrimination on the basis of a mental disability involving bipolar disorder or clinical depression have been mostly unsuccessful in litigating their claims."); Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 21 (2000) ("In light of the court decisions, it is easy to criticize the draftsmanship of the ADA. But the text itself does not mandate the narrow approach that the courts have taken.").

¹²³ A survey of the legislative history reveals that both Congress and those experts who testified before it primarily contemplated the challenges of individuals with physical disabilities. The legislators' and scholars' practical considerations, therefore, focused on how the legislation would apply to these individuals only. The reports on reasonable accommodations expose this shortcoming. Whereas Congress announced that both physical and mental impairments might qualify as disabilities, see 42 U.S.C. § 12102(2)(A) (1994), none of the hypothetical situations presented to illustrate the application of the legislation and the use of accommodations incorporate mentally ill employees. See, e.g., H.R. REP. NO. 101-485, pt. 2, at 33-34 (1990), reprinted in 1990 U.S.C.A.N. 303, 314-16; S. REP. NO. 101-116, at 28-36 (1989).

obstacles presented by their disabilities."¹²⁴ *Their* statute protected people who could "compete with other applicants and employees in spite of having a disability."¹²⁵ Most of these trailblazers, however, had physical, not mental impairments.

A physically disabled individual's impairments are both visible and involuntary—most people suspect that a wheelchair-bound person would prefer to walk.¹²⁶ In this regard, the ADA identified physically impaired individuals and encouraged them to function "normally," providing them with the necessary accommodations. Concurrently, Congress attempted to dissolve preconceptions and reinforce notions that the physically disabled should be admired for perseverance.¹²⁷

On the other hand, mental illness is often perceived as voluntary—mere laziness or irrationality—and, moreover, is not readily apparent.¹²⁸ When an employee is unproductive, we assume she lacks a solid work ethic. Because we do not detect that she suffers from major depression—she does not *look* disabled—we reinforce this notion of voluntarism.¹²⁹ In addition, since we have comparatively little information on psychological phenomena, society is generally suspicious of those affected by mental illness.¹³⁰

As such, many employers and courts believe that individuals who do not have severe mental disorders abuse the law—that people with minor emotional problems conjure up vague claims of stress disorders and threaten employers with ADA litigation in order to gain "conces-

¹²⁴ Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW*, *supra* note 118, at 203, 204.

¹²⁵ *Id.* at 204-05.

¹²⁶ Campbell & Kaufmann, *supra* note 118, at 223.

¹²⁷ *See id.* (noting that physically disabled individuals who "are able to perform major social roles . . . are usually admired"); *cf. supra* note 117 and accompanying text.

¹²⁸ *See* Campbell & Kaufman, *supra* note 118, at 223-24.

¹²⁹ *Id.* One commentator contests the common notion that mental disabilities should be distinguished because they are "hidden." Blair, *supra* note 122, at 1395. Blair states that he is

dubious of such generalizations, particularly when considering the more severe mental illnesses such as bipolar disorder, schizophrenia, and major depression. Anyone who has observed a delusional or paranoid schizophrenic would likely scoff at the notion that such a mental disorder is in any way inconspicuous. . . . Simply because a mental illness is more difficult to diagnose . . . does not necessarily imply that it is elusive. . . . Nonetheless, when somebody is suffering from a severe mental illness such as schizophrenia, it should be apparent that the individual is suffering from *some* mental disorder, albeit one that might not lend itself to easy diagnosis.

Id. at 1396.

¹³⁰ *See* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 *VILL. L. REV.* 345, 390 (1997) (discussing studies indicating that employers are more apprehensive with mentally ill employees than they are with those who are physically impaired).

sions."¹³¹ In this view, only two types of mental impairment exist: total debilitation and mere phobia.¹³²

One explanation for the judiciary's distrust is that a mentally ill individual or his counsel often cannot precisely describe the individual's impairment or, in particular, how he is limited by the impairment.¹³³ A comment by the Second Circuit in response to a plaintiff asserting a substantial limitation in the major life activity of "everyday mobility" illustrates this predicament: "[The plaintiff] narrows the frame of reference and hypothesizes a major life activity called 'everyday mobility,' which he then defines (*so far as he does attempt to define it*) largely by means of examples that are coextensive with his symptoms."¹³⁴

B. The Catch-22 of Disability and Qualification

ADA claimants are faced with a catch-22 relating to the dual requirements of disabled status and qualification for the position. As stated above, "a qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹³⁵ Thus, the individual must initially demonstrate that her impairment substantially limits a major life activity.¹³⁶ Then, she must establish that she is "otherwise qualified"—that

¹³¹ See Richard J. Bonnie, *Work Disability and the Fabric of Mental Health Law: An Introduction*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW, *supra* note 118, at 1, 4-5; see also Blanck & Marti, *supra* note 130, at 374 (noting that employers and coworkers often believe that accommodations provided for mentally ill employees involve "special privileges"); Eichhorn, *supra* note 50, at 1426 (discussing "fear that people who are not 'truly disabled' will somehow take advantage of antidiscrimination laws"); L.M. Sixel, *Law on Disabled Read Differently*, Hous. Chron., July 5, 1996, at 1 ("Employers tend to be most accommodating if they can see why someone must be assisted—like an employee in a wheelchair. Employees with less visible problems such as mental illnesses, chronic fatigue syndrome or neurological diseases don't get as much employer support.").

¹³² See, e.g., *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 152-53 (2d Cir. 1998) (noting that plaintiff suffering from "Panic Disorder with Agoraphobia" did not assert an inability to leave home or travel to work). Of course, if Reeves had claimed an inability to leave home or the like, the court would doubtless have found the plaintiff "not otherwise qualified," an issue discussed *infra* Part III.B.

¹³³ *Reeves*, 140 F.3d at 152. A similar problem often arises in courts' analyses of whether the employer was "on notice" that the employee was disabled. See *infra* Part III.C.

¹³⁴ *Reeves*, 140 F.3d at 152 (emphasis added). Although wheelchair-bound individuals had previously raised "everyday mobility" in public accommodation Rehabilitation Act cases, see *id.* at 150-51 n.4 (citing *Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd v. Reg'l Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977)), the court refused to recognize the theory in this context. For a criticism of the *Reeves* decision, see Eichhorn, *supra* note 50, at 1443-44.

¹³⁵ 42 U.S.C. § 12111(8) (1994).

¹³⁶ *Id.* § 12102(2).

she can perform the job's essential functions.¹³⁷ Yet, the "otherwise qualified" criterion produces a trap for claimants: an individual must demonstrate that her impairment rises to the level of "substantially limiting" while simultaneously proving that this limitation does not prevent her from executing the essential functions of the position.¹³⁸ This catch-22 is particularly troublesome in mental illness cases.

Individuals with mental illnesses face two common problems at work: (1) they have attendance difficulties, many of which result from the psychotropic drugs they use to treat their illnesses;¹³⁹ and (2) they have trouble handling stress, a problem which often manifests itself in concentration lapses, interpersonal problems, and general misconduct.¹⁴⁰

As a result of these common problems, plaintiffs' cases are routinely dismissed as a matter of law, with courts declaring the mentally ill individual "not otherwise qualified."¹⁴¹ In doing so, courts proclaim that predictable attendance¹⁴² and handling stress without violating conduct standards¹⁴³ are essential functions of every job.

¹³⁷ *Id.* § 12111(8) (also indicating that, in determining essential job functions, courts should emphasize the employer's requirements and defer to employer judgment when reasonable). The EEOC suggests that the "qualified" inquiry is two-pronged. First, the individual must meet the basic requirements for the position, such as the necessary education and experience. Second, the person must be able to "perform the essential functions of the position . . . with or without reasonable accommodation." *See* 29 C.F.R. § 1630.2(m) (2000).

¹³⁸ PARRY, *supra* note 32, at 29; Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 127-28 (1997); Mayerson, *supra* note 27, at 587 ("These restrictive judicial interpretations of the ADA reflect, at best, a lack of understanding of the statute and, at worst, a blatant hostility towards the profound goals of the ADA.").

¹³⁹ *See* Zuckerman, *supra* note 20, at 316; JOB ACCOMMODATION NETWORK, ACCOMMODATION IDEAS FOR PERSONS WITH PSYCHIATRIC DISABILITIES, at <http://www.jan.wvu.edu/media/Psychiatric.html> (last visited Feb. 8, 2000).

¹⁴⁰ *See* Zuckerman, *supra* note 20, at 314. Deborah Zuckerman explained:

People with depression . . . may face episodes of despair and hopelessness that make it difficult to work. People with bipolar illness may experience mood shifts from extreme highs to deep lows which may affect their productivity. Generally, individuals with mental illness have difficulty coping with stress, which may precipitate additional problems in the work place. Each employee with a mental illness will be affected differently, however, depending on the symptoms, severity, and duration of the illness.

Id.

¹⁴¹ *See* Blair, *supra* note 122, at 1393; *cf.* 1 LEX K. LARSON ET AL., EMPLOYMENT DISCRIMINATION § 8.08(2) (2000) (discussing Title VII racial discrimination cases and suggesting that, rather than at the "qualification" stage, performance problems should only enter the analysis when an employer asserts such problems as a nondiscriminatory reason for an employment action).

¹⁴² *E.g.*, Hendry v. GTE N., Inc., 896 F. Supp. 816, 825 (N.D. Ind. 1995).

¹⁴³ *E.g.*, Martin v. Gen. Mills, Inc., No. 95C2846, 1996 WL 648721, at *7 (N.D. Ill. 1996) ("The ADA does not protect people from the general stresses of the workplace.").

1. Attendance Problems

Several courts have held that an employee who cannot meet the employer's attendance requirements cannot be qualified—one "who does not come to work, cannot perform *any* of his job functions, essential or otherwise."¹⁴⁴ The EEOC, however, proposes occasional leaves of absence and workday breaks, along with part-time scheduling as reasonable accommodations for the mentally ill.¹⁴⁵ Yet, although some scheduling flexibility might be acceptable, it would be quite unreasonable to forbid an employer from requiring predictable attendance of its employees.¹⁴⁶

One of the most significant problems with accommodating the tardiness and absenteeism of the mentally ill is that employers cannot guarantee its success. Unlike the physically disabled, who can more often be accommodated through a consistent system or a permanent workspace modification, a mentally disabled employee's needs are frequently varied and unpredictable.¹⁴⁷ In general, courts have held that when "the accommodation the plaintiff seeks is simply to be allowed to work only when her illness permits," such an accommodation would result in undue hardship on the employer.¹⁴⁸

2. Stress and Conduct Problems

A personality conflict with a coworker or supervisor, even one that produces depression or anxiety, does not itself establish ADA disability status.¹⁴⁹ However, as Judge Richard Posner stated in *Palmer v. Circuit Court*,¹⁵⁰ "a personality conflict" or "other source[] of normal

¹⁴⁴ Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994); see Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994); Mancini v. Gen. Elec. Co., 820 F. Supp. 141, 147 (D. Vt. 1993).

¹⁴⁵ EEOC Psychiatric Guidance, *supra* note 35, at N:2338.

¹⁴⁶ See Hendry, 896 F. Supp. at 825 (stating that "regular attendance at work is an essential function of virtually all jobs"); see also Sarah Starnes, Note, *Psychiatric Disabilities & the ADA: An Analysis of Conventional Defenses & EEOC Guidelines*, 18 REV. LITIG. 181, 186 (1999) ("Although some flexibility in scheduling might be expected as a reasonable accommodation, an employer can require predictable attendance as an essential function of most jobs.").

¹⁴⁷ PARRY, *supra* note 32, at 57 ("Some people with mental illnesses find that the irregular and episodic nature of their illnesses interfere [sic] with the steady, regular demands of the work place."); Louis Pechman, *Mental Disabilities in the Workplace*, N.Y. L.J., Mar. 2, 1994, at 1 ("Accommodating an individual's psyche . . . is an inherently elusive task.").

¹⁴⁸ Walders v. Garrett, 765 F. Supp. 303, 313 (E.D. Va. 1991); see also Hendry, 896 F. Supp. at 826-27 (stating that accommodation of employee's unpredictable absenteeism problem as a result of migraine headaches would cause her employer "undue hardship"). The ADA does not require an employer to provide a reasonable accommodation if it would work an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A) (1994).

¹⁴⁹ Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1997).

¹⁵⁰ 117 F.3d 351 (7th Cir. 1997).

stress" could "trigger[] a serious mental illness that is in turn disabling."¹⁵¹

Nevertheless, the ADA allows employers to set conduct standards and require that all employees meet them. Thus, an employer can terminate an employee, whether disabled or not, for failing to meet those standards as long as they are "job-related" and "consistent with business necessity."¹⁵² For instance, in *Palmer*, an employee suffering from major depression and a delusional/paranoid disorder threatened her supervisor.¹⁵³ The court determined that the plaintiff was, in fact, disabled.¹⁵⁴ Yet the fact that her misconduct was "precipitated by a mental illness d[id] not present an issue under the Americans with Disabilities Act"¹⁵⁵ because, by threatening her supervisor, Palmer became disqualified.¹⁵⁶

C. Accommodating Only Known Disabilities

An employer must provide reasonable accommodations only for *known* disabilities.¹⁵⁷ Because mental and emotional impairments are generally not obvious, "many ADA claims will fail simply because the employer was never on notice that an employee was disabled and required special accommodation."¹⁵⁸ As one court noted: "The ADA does not require clairvoyance."¹⁵⁹

In fact, courts have carefully distinguished between knowledge of an impairment and knowledge of a limitation resulting from that im-

¹⁵¹ *Id.* at 352 (noting also that the court's "only point is to distinguish between the nondisabling trigger of a disabling mental illness and the mental illness itself").

¹⁵² 42 U.S.C. § 12112(b)(6).

¹⁵³ *Palmer*, 117 F.3d at 352.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Several commentators have attacked Judge Posner's reasoning in *Palmer*, claiming that he ignored the ADA's more stringent requirement that an employee can be singled out only if she poses a "direct threat" to the safety of others. *See* 42 U.S.C. § 12113(b). Many courts seem to avoid the "direct threat" analysis by simply finding the employee "not otherwise qualified." *See, e.g.,* EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997); *Mazzarella v. U.S. Postal Serv.*, 849 F. Supp. 89, 96 (D. Mass. 1994). For detailed discussions of this issue, see Karen Dill Danforth, Note, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Illness Following Palmer*, 85 VA. L. REV. 661 (1999); Starnes, *supra* note 146.

¹⁵⁷ 42 U.S.C. § 12112(b)(5)(A).

¹⁵⁸ Starnes, *supra* note 146, at 184. In *Miller v. National Casualty Co.*, 61 F.3d 627 (8th Cir. 1995), a plaintiff with manic depression told her superior that she needed a few days off because she "could not take the stress of [her] job" and had family problems. *Id.* at 629. When she did not return on the scheduled date, the plaintiff's sister called the office and stated that the plaintiff was "mentally falling apart" and that the family was "trying to get her into the hospital." *Id.* The plaintiff had never informed her employer that she suffered from a mental impairment until after receiving her termination letter. *Id.* at 630. Thus, despite the sister's statements, the court held the company acted reasonably when it failed to recognize that the plaintiff suffered from an ADA-covered disability. *See id.*

¹⁵⁹ *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995).

pairment.¹⁶⁰ It is the limitation, not the impairment, that an employer must accommodate.¹⁶¹ Once an employer is aware of a limitation, the EEOC suggests that the employer and employee work together to institute an effective accommodation.¹⁶² In the end, though, the employee must request and specifically identify the accommodation.¹⁶³ Of course, to do so, the disabled person must have the "self-awareness, knowledge, and communication skills" to engage in useful interaction.¹⁶⁴

However, employees with mental illnesses may not be "sufficiently cognizant of the fact that they have a mental illness."¹⁶⁵ For example, those suffering from depression or bipolar disorder may not be the first to recognize their problems because of the gradual nature of the illnesses.¹⁶⁶ Other illnesses, like schizophrenia, often render the individual incapable of comprehending reality.¹⁶⁷ Moreover, as one authority noted: "Denial is a common aspect of many mental

¹⁶⁰ *E.g.*, *Taylor v. Principal Fin. Group*, 93 F.3d 155, 164 (5th Cir. 1996).

¹⁶¹ *See id.* In *Taylor*, the Fifth Circuit turned the purpose of the ADA against the plaintiff, stating: "[T]he ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs." *Id.* It appears the court substituted the common version of the word "disability" (as opposed to the ADA's definition) for the statutory term "impairment."

As a general proposition, the Fifth Circuit's approach seems a sensible and necessary component in the struggle to alleviate stereotypical assumptions about disabilities. Moreover, it should certainly apply in the nebulous area of psychological diagnoses, where labels are almost irrelevant without individual inquiries. The American Psychiatric Association stated that "there is no assumption that each category of mental disorder is a completely discrete entity with absolute boundaries dividing it from other mental disorders or from no mental disorder." AM. PSYCHIATRIC ASS'N, *supra* note 36, at xxii. The Supreme Court has also addressed this difficulty: "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." *Addington v. Texas*, 441 U.S. 418, 426-27 (1979); *see also* *Burgdorf*, *supra* note 4, at 521 (discussing the continuum of mental health and the blurry boundaries between mental health and mental disorder).

¹⁶² *See* 29 C.F.R. § 1630.2(o)(3) (2000) (proposing that employer "initiate an informal, interactive process" with disabled individual); *see also* *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000) (holding employer liable for failure to engage in interactive process with mentally disabled employee).

¹⁶³ *See Avoiding Summary Judgment*, *supra* note 42, at 2254.

¹⁶⁴ *Bell*, *supra* note 124, at 205.

¹⁶⁵ *Blair*, *supra* note 122, at 1398; *see also* *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309-10 (3d Cir. 1999) ("We should not insist that all plaintiffs with bipolar disorder must have . . . self-awareness and expressive powers . . . before we allow that their condition is substantially limiting.").

¹⁶⁶ *Blair*, *supra* note 122, at 1398.

¹⁶⁷ *See id.*

impairments. Similarly, an individual may be aware of the condition, but be in denial about the need for accommodation."¹⁶⁸

It is clear that vague requests for fewer job responsibilities, less pressure, or reduced stress are insufficient to put an employer on notice that an employee is disabled or requires a specific accommodation.¹⁶⁹ As the Fifth Circuit stated:

Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.¹⁷⁰

IV

MENTAL ILLNESS ADA CLAIMS FOLLOWING *SUTTON*

Sutton gives employers significant leeway in establishing qualification standards based on mental or physical characteristics.¹⁷¹ Since the statute no longer covers many of the individuals affected by those standards, fewer courts will need to address whether hiring or promotion criteria meet the ADA's requirement of job-relatedness and business necessity.¹⁷²

Mentally ill individuals whose impairments are controlled, at least in part, by medication will have to adjust their litigation strategies. Both litigants and courts will need to closely scrutinize the interaction between illness and medication. In addition, although many plaintiffs will undoubtedly resort to the second and third prongs of the ADA "disability" definition—the "record of" and "regarded as" sections—this approach carries significant drawbacks.¹⁷³ Finally, due to the difficult evidentiary standard in cases involving the major life activity of working, many future plaintiffs will need to bring claims based on other major life activities that have been successful in the wake of *Sutton*.

¹⁶⁸ Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 948 (1997) (citation omitted).

¹⁶⁹ *Avoiding Summary Judgment*, *supra* note 42, at 2255.

¹⁷⁰ *Taylor v. Principal Fin. Group*, 93 F.3d 155, 165 (5th Cir. 1996).

¹⁷¹ See Hungar & Scalia, *supra* note 88, at 714; Michael Starr & Jan F. Constantine, *Employer Qualification Tests: Deeper Meaning of Recent Cases in High Court*, N.Y. L.J., Aug. 23, 1999, at S1.

¹⁷² See 29 C.F.R. § 1630.10 (2000).

¹⁷³ See, e.g., *infra* Part IV.B.

A. Issues with Medication: Effectiveness and Side Effects

From a plaintiff's perspective, the most significant loophole in *Sutton* is the Court's declaration that both the positive and negative effects of mitigating measures should be considered when assessing an individual's disabled status.¹⁷⁴ The Court observed, accordingly, that the "use or nonuse of a corrective device does not determine whether an individual is disabled."¹⁷⁵ Therefore, if a mentally ill plaintiff uses medication that is only mildly effective or causes disabling side effects, he might nonetheless be substantially limited in a major life activity.

Consequently, courts examining plaintiffs using medications should pose three questions: (1) Is the impairment fully corrected? (2) If the impairment is not fully corrected, does it still rise to the level of "substantially limiting"? (3) Regardless of whether the impairment is fully corrected, do any side effects of the corrective measure substantially limit a major life activity?

1. Plaintiff Losses: The "Functioning" Individual

At least two courts have rejected mentally ill individuals' claims after *Sutton* because their medications and counseling "allow [them] to function without limitation."¹⁷⁶ In *Spades v. City of Walnut Ridge*,¹⁷⁷ a police officer who had attempted suicide was denied reinstatement after a leave of absence based on the city's fear that his continued employment would increase the city's liability.¹⁷⁸ The *Spades* court did not reach the question of whether the city's decision was consistent with business necessity because the plaintiff's ability to "function" meant his depression was "corrected" and therefore could not "substantially limit a major life activity."¹⁷⁹

In *Robb v. Horizon Credit Union*,¹⁸⁰ the District Court for the Central District of Illinois rejected the plaintiff's claim on similar grounds.¹⁸¹ In that case, following a hospitalization for depression and suicidal tendencies, the plaintiff-employee returned to work.¹⁸² Upon her return, the company president directed a manager to monitor the plaintiff's personal telephone calls.¹⁸³ Later, the president reprimanded the plaintiff for having personal conversations with a co-

¹⁷⁴ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

¹⁷⁵ *Id.* at 488.

¹⁷⁶ *Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8th Cir. 1999) (internal quotation marks omitted).

¹⁷⁷ 186 F.3d 897 (8th Cir. 1999).

¹⁷⁸ *Id.* at 899.

¹⁷⁹ *Id.* at 900.

¹⁸⁰ 66 F. Supp. 2d 913 (C.D. Ill. 1999).

¹⁸¹ See *id.* at 918.

¹⁸² *Id.* at 914-15.

¹⁸³ *Id.* at 915.

worker and demanded that plaintiff write a memorandum regarding the incident, or risk termination.¹⁸⁴ Moreover, although the plaintiff's supervisor routinely permitted his employees to leave work for medical appointments—with the understanding that the employee would make up the time the following day—the president would not allow the plaintiff to take advantage of this system.¹⁸⁵ Soon thereafter, the president changed the plaintiff's traditional lunch schedule.¹⁸⁶ Finally, the president fired the plaintiff without issuing a warning and despite her supervisor's disagreement.¹⁸⁷ The president, stating that the plaintiff's work had been satisfactory, asserted that the termination was merely based on a "personality conflict."¹⁸⁸ The court rejected the plaintiff's claim under the first prong of the disability definition because she admitted that her drugs "allowed her to function" and because she had been working without restriction.¹⁸⁹

2. *Promising Signs for Plaintiffs*

Following *Sutton*, some courts have begun to emphasize the factual sensitivities of cases concerning the effects of psychotropic medications and the need for jury deliberation on this issue. Employees might be substantially limited entirely as a result of the adverse side effects of their medications or by a combination of those side effects and the employee's continuing symptoms. At least one court has read *Sutton*'s mitigating measures holding narrowly, distinguishing the case on its facts.¹⁹⁰ Since *Sutton*, plaintiffs have been able to create jury questions on whether the side effects of their psychotropic medica-

¹⁸⁴ *Id.* at 915-16.

¹⁸⁵ *Id.* at 915.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 916.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 917-18; *see also infra* note 307 (identifying cases in which limitations in the ability to sleep were controlled by medications). Although the *Rabb* court properly examined the plaintiff's condition after taking the medication, the court should only have assessed the plaintiff's status as of the time of her termination. The court should not have considered her status when she began a new job more than one year following her termination. For a discussion of the court's analysis of the plaintiff's "regarded as" claim, *see infra* note 239.

¹⁹⁰ *See Federal Judge: Jury Should Decide Some ADA Cases if Disability Not Fully Controlled*, P.A. L. WKLY., July 26, 1999, at 2; *EEOC v. United Airlines, Inc.*, No. 98-2076, 1999 U.S. App. LEXIS 25938 (10th Cir. June 17, 1999) (table opinion, full text available on LEXIS).

tions alone "substantially limited" sleeping,¹⁹¹ interacting with others,¹⁹² and engaging in sexual relations.¹⁹³

Also, the Third Circuit recognized that although a mentally ill individual's symptoms were partially controlled by medication, the combination of her remaining symptoms and the medication's adverse side effects could create a triable issue as to whether she was substantially limited in the major life activity of thinking.¹⁹⁴ In fact, the court used evidence of the plaintiff's continued inability to understand the gravity of her illness to support its conclusion that she was substantially limited in her ability to think.¹⁹⁵ Interestingly, the Third Circuit carefully delineated the "direct" and "indirect" side effects of the plaintiff's medication.¹⁹⁶ Both nausea (an indirect side effect) and memory and concentration problems (direct side effects) could have limited the plaintiff's ability to think.¹⁹⁷ Accordingly, the court noted that the plaintiff "had to contend with a serious, very much ongoing condition."¹⁹⁸

Similarly, some mitigating measures might only be effective intermittently. Whereas a high likelihood of recurrence does not alone establish a disability, an "intermittent impairment that is a characteristic manifestation of an admitted disability . . . falls outside the realm of temporary, non-chronic impairments."¹⁹⁹ Since mental illness is inherently unpredictable and physicians often adjust patients' medica-

191 *E.g.*, *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999); *see also* *Franklin v. Consol. Edison Co.*, No. 98 CIV 2286, 1999 WL 796170, at *12 (S.D.N.Y. Sept. 30, 1999) (holding that epilepsy medication substantially limited plaintiff's ability to sleep). *But see* *Todd v. Acad. Corp.*, 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (holding that an epileptic was not substantially limited by the side effects of his medication). Although the plaintiffs in *Franklin* and *Todd* suffered from epilepsy, which is a physical impairment, *see Todd*, 57 F. Supp. 2d at 452, the unpredictable nature of that disease and the side effects of its treatment supply an interesting comparison to mental illness cases.

192 *E.g.*, *McAlindin*, 192 F.3d at 1234.

193 *E.g.*, *id.*

194 *See* *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 308-09 (3d Cir. 1999).

195 *Id.* at 310.

196 *See id.* at 308-09.

197 *Id.*

198 *Id.* at 309.

199 *Brown v. N. Trust Bank*, No. 95-C-7559, 1997 WL 543098, at *5 (N.D. Ill. Sept. 2, 1997) (internal quotation marks omitted). Since the *Sutton* decision, the EEOC has suggested that its officers ask whether mitigating measures are effective only intermittently or "tend to become less effective under certain conditions," such as "great stress," "adverse weather conditions," "illnesses," or, for women, "monthly hormonal changes." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, INSTRUCTIONS FOR FIELD OFFICES: ANALYZING ADA CHARGES AFTER SUPREME COURT DECISIONS ADDRESSING "DISABILITIES" AND "QUALIFIED" 5 (1999), *reprinted in* 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 313, 319 (PLI Lit. & Admin. Practice Series, Handbook Series No. H-615, 1999) [hereinafter SEPTEMBER 1999 EEOC INSTRUCTIONS]; *see also* Judge David L. Bazelon Ctr. for Mental Health, *The Supreme Court's 1999 ADA Decisions*, at <http://www.bazelon.org/sct99ada.html> (May 30, 2000) (suggesting that an individual who experiences intermittent periods of substantial limitation might be disabled).

tions with mixed success,²⁰⁰ an individual who is only functioning well on a month-to-month basis might qualify as disabled.

The District Court for the Eastern District of Pennsylvania has gone even further, holding that mitigating measures should only bar suit when they "fully control" an individual's impairment.²⁰¹ In doing so, the court distinguished *Sutton* as a clear-cut case concerning poor eyesight and common eyeglasses.²⁰²

3. *Are Employees Obligated to Take Medications?*

Does the Court's mitigating measures ruling produce a disincentive to self-help?²⁰³ If so, can an employer require that an employee take medication for an alleged disability? If the employee refuses, does she relinquish coverage under the ADA?²⁰⁴

Some have argued that the mitigating measures ruling creates an odd result: the disabled individual who strictly follows medical advice might fall outside the scope of the statute, whereas her "less disciplined counterpart" would garner protection.²⁰⁵ Moreover, one individual who can afford certain medications or treatments might not be covered, yet a less fortunate person with a similar impairment could qualify as disabled under the statute.²⁰⁶

The primary concern, however, is not the fully cured person, who might utilize the "record of" prong of the disability definition. Rather, the courts should scrutinize the situation facing the individual who improves his impairment to the point at which he is no longer

²⁰⁰ See Brief of Amici Curiae Senator Harkin et al. at 10-11, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (No. 97-1943); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (No. 97-1992); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (No. 98-591) [hereinafter *Harkin Brief*] (noting that mental illnesses "fluctuate in severity over time").

²⁰¹ See *Federal Judge: Jury Should Decide Some ADA Cases if Disability Not Fully Controlled*, *supra* note 190.

²⁰² See *id.*; see also 9 LARSON ET AL., *supra* note 141, § 153.04(3)(f) (suggesting that one might circumvent a summary judgment ruling under *Sutton* by arguing that the condition at issue cannot be controlled with the sort of precision by which eyeglasses control poor sight).

²⁰³ See *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 863 n.7 (1st Cir. 1998). *Sutton* abrogated *Arnold's* holding that mitigating measures should not be considered in assessing disabled status. See *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234, 238 (D. Mass. 1999).

²⁰⁴ One commentator posed this question following *Sutton*: "[C]ould an employer require an employee to take mitigating or corrective measures for a claimed disability. . . ? It does not seem to be a great stretch to bar from ADA coverage employees whose 'disabilities' could be easily corrected, but who do not so." Steinberg, *supra* note 44, at 5; see also 9 LARSON ET AL., *supra* note 141, § 153.04(3)(e) (discussing forced mitigating measures and asking whether one needs to accept unwanted treatment, how compelling a reason warrants that treatment, and whether the cost of mitigating measures might be a factor).

²⁰⁵ *Harkin Brief*, *supra* note 200, at 13.

²⁰⁶ See *Arnold*, 136 F.3d at 862.

"substantially limited," but still has difficulty performing at the expected level. Such a person is not disabled under the first prong and is therefore not entitled to receive accommodations. He might base a claim on the "record of" prong, but as explained below,²⁰⁷ this route would not entitle him to the necessary accommodation. He would remain "not otherwise qualified"²⁰⁸ and thus have a "disincentive to self-help."²⁰⁹ To combat this potential backlash, courts have consistently held that a disabled employee must do his part: He should not receive accommodations unless he first takes reasonable steps to improve the impairment himself.²¹⁰

Several interesting scenarios arise if an employee refuses to use medication because of its harsh side effects. For instance, despite accommodations, the nonmedicated employee might not be able to perform the essential functions of the job. In that case, he is clearly not qualified. Moreover, if the nonmedicated employee can still perform his job, but only with an accommodation, must the employer grant the accommodation? Or can the employer insist that the employee take the medication needed to provide his highest quality labor, regardless of the medication's side effects?²¹¹

²⁰⁷ See *infra* Part IV.B.1.

²⁰⁸ See *Franklin v. U.S. Postal Serv.*, 687 F. Supp. 1214, 1219 (S.D. Ohio 1988) (concluding in a Rehabilitation Act case that a "person suffering from the condition of paranoid schizophrenia that is controllable by the ingestion of medication who does not take such medication is not an 'otherwise qualified handicapped person.'"); cf. *Burroughs v. City of Springfield*, 163 F.3d 505, 508-09 (8th Cir. 1998) (using this alternative reasoning in a diabetes case).

²⁰⁹ *Arnold*, 136 F.3d at 863 n.7.

²¹⁰ See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 653 & n.167 (1999). In *Roberts v. County of Fairfax*, 937 F. Supp. 541 (E.D. Va. 1996), a mentally ill employee's supervisors consistently urged him to seek treatment, and recommended that he contact the county Employee Assistance Program. *Id.* at 543. The employee, who never sought help, claimed that the company "had a legal duty to require him to obtain counseling." *Id.* at 548. The court held that the plaintiff was not a qualified individual under the ADA because he was unwilling to accept a necessary accommodation. *Id.* Moreover, the company had no duty to force him to accept such an accommodation. *Id.* at 547-48; cf. Harkin Brief, *supra* note 200, at 13 (expressing concern that if mitigating measures are considered in evaluating disability status, courts would improperly question whether the impairment could be controlled).

²¹¹ See, e.g., *Federal Judge: Jury Should Decide Some ADA Cases if Disability Not Fully Controlled*, *supra* note 190.

The article describes a case in which the plaintiff, a doctor with Attention Deficit Disorder (ADD), claimed that his employer discriminated against him when his coworkers learned that he took ADD medication. *Id.* The plaintiff alleged that although his medication could fully control his symptoms, he took a lower dosage in order to avoid side effects that would have affected his surgical abilities. *Id.* The trial court denied the defendant's Motion for Summary Judgment on the disability issue. *Id.*

If the doctor had taken the full dosage of medication, he would have fully controlled his ADD, but would have created side effects that would have prevented him from doing his job. Thus, he might not have been qualified for his position as a surgeon, and moreover, would not have been substantially limited in a broad class of jobs. His situation would constitute a new catch-22.

B. Using the "Record of" and "Regarded as" Prongs to Attain Disabled Status

The decision in *Sutton* can preclude a plaintiff, whose condition is at least partly controlled, from addressing in court whether she was the victim of discrimination. However, mentally ill plaintiffs will attempt to circumvent this barrier by using the "record of" and "regarded as" prongs of the ADA's disability definition.²¹² Ultimately, however, even if mentally ill plaintiffs can satisfy the difficult evidentiary burdens of the prevailing statutory interpretation, the limited remedies available will likely disappoint them.

1. *Having a "Record of" a Disability*

In September 1999, the EEOC issued a series of *Instructions for Field Officers* in response to the Court's declarations concerning corrective measures.²¹³ The Commission recognized the newfound importance of the "record of" prong,²¹⁴ suggesting that investigators take it into consideration in all mitigating measures cases. In essence, the Commission's instructions anticipate that a claimant with a severe but controlled condition will have at some point experienced the condition's debilitating effects.²¹⁵

If the employer were aware of this history, a claimant could argue that, regardless of his or her current status, the employer based its actions on the formerly untreated ailment.²¹⁶ An employee with a "controlled" mental illness might argue that the employer acted on the belief that the claimant was likely to relapse, was unreliable, or posed an insurance risk.²¹⁷ A court would first have to determine that the plaintiff was, at one time, substantially limited. For instance, a claimant who returned to work after a hospitalization for mental ill-

²¹² See *The Supreme Court—Leading Cases*, 113 HARV. L. REV. 200, 344-45 (1999) [hereinafter *Leading Cases*] (predicting fewer viable first-prong claims and therefore increased second- and third-prong claims).

²¹³ See SEPTEMBER 1999 EEOC INSTRUCTIONS, *supra* note 199.

²¹⁴ In the past, plaintiffs have rarely invoked the "record of" prong. Eichhorn, *supra* note 50, at 1461 (stating that "record of" cases are the least frequently asserted).

²¹⁵ See SEPTEMBER 1999 EEOC INSTRUCTIONS, *supra* note 199, at 10-12; Shannon P. Duffy, *U.S. Supreme Court's ADA Rulings Shake Plaintiffs' Employment Bar*, 220 LEGAL INTELLIGENCER, June 24, 1999, at 1, 10 (Plaintiffs' attorney Lisa M. Rau states: "I do think we can save a lot of these cases by going immediately to the second prong. . . . Most people who have mitigating measures will have a history that you can point to."); see also Brief of Amicus Curiae AFL-CIO at 20 n.7, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (No. 97-1943) (arguing that *Arline* indicates that "record of" claims are not limited to past, fully cured impairments).

²¹⁶ See Brief of Amicus Curiae AFL-CIO, *supra* note 215, at 17-18 & n.6 (encouraging increased use of the "record of" prong in the realm of controlled impairments).

²¹⁷ See *id.* at 20 (noting that in mental illness cases, as in *Arline*, employers are concerned that the condition might become active or that medications might not work).

ness might succeed under the "record of" prong.²¹⁸ If the employer bases current employment decisions on the individual's medical history, the employer has, in essence, trapped the employee in the past, rendering ineffective the workplace benefits of his current medication.

2. *Being "Regarded as" Having a Disability*

As one commentator noted, the "regarded as" prong "is intended to take the attention away from the actual physical or mental limitations of the individual and to focus instead on an examination of the employer's policies."²¹⁹

Thus, mentally ill plaintiffs who are precluded from asserting an actual disability due to the effectiveness of their medication will likely refer to the *Arline* Court's disdain for "the accumulated myths and fears" confronting disabled individuals²²⁰ and argue that the employer acted upon stereotypical attitudes about the mentally ill. Under the prevailing judicial interpretation of the "regarded as" prong, however, this is no easy task.²²¹ An employer will not be assessed liability under the "regarded as" prong for maintaining general fears or misconceptions about the mentally ill or even for the disparate treatment of a mentally ill plaintiff. Rather, the plaintiff must present evidence that the employer incorrectly believed that she was substantially limited in a major life activity.²²² Plaintiffs are rarely successful under the difficult standard of this prong.²²³

²¹⁸ See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 281 (1987), *superseded by statute as stated in Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994) (recognizing that hospitalization was "a fact more than sufficient to establish that one or more of [Arline's] major life activities were substantially limited by her impairment"). But see *Glidden v. County of Monroe*, 950 F. Supp. 73, 76 (W.D.N.Y. 1997) (stating that a five-day hospital stay for mental illness, without suggestion that the impairment at that time was substantially limiting, was not enough for record of disability).

One might also argue that a medically required leave of absence from work indicates a "record of" a substantial limitation in the major life activity of working. Nonetheless, hospitalization is certainly a better candidate for a *per se* rule than a leave of absence situation. For a discussion of *Arline* and its influence on the drafting of the ADA, see *supra* Part I.B.1.

²¹⁹ Mayerson, *supra* note 27, at 588-89; see also Burgdorf, *supra* note 4, at 435 (noting that the "regarded as" prong "focuses on the existence of discrimination, not upon the characteristics of the person upon whom discrimination is visited"); *Definition of the Term "Disability,"* 130 EEOC Compl. Man. (CCH) § 902.8(a) (1995) (stating that "this part of the definition is directed at the employer rather than at the individual alleging discrimination").

²²⁰ *Arline*, 480 U.S. at 284.

²²¹ See Burgdorf, *supra* note 4, at 571-72; Eichhorn, *supra* note 50, at 1462-63; *Leading Cases*, *supra* note 212, at 347.

²²² See Bales, *supra* note 47, at 232-33; Burgdorf, *supra* note 4, at 571-72; Eichhorn, *supra* note 50, at 1462-63.

²²³ See Locke, *supra* note 138, at 141 & n.159.

a. *Success with "Regarded as"*

Nonetheless, some courts have held that "regarded as" plaintiffs warrant ADA protection.²²⁴ Many ADA pundits emphasize the parallels between the plight of "regarded as" disabled individuals and that of victims of race or gender discrimination. As Judge Posner explained:

[The "regarded as" prong] actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.²²⁵

With this in mind, courts should "carefully scrutinize" the employer's reasons for taking an adverse employment action.²²⁶ The EEOC, for example, suggests that workers' compensation and medical files may contain evidence of generalized fears or stereotypes concerning a mentally ill employee.²²⁷

*Holihan v. Lucky Stores, Inc.*²²⁸ is one of the few mental illness cases in which the employee's "regarded as" claim survived summary judgment.²²⁹ In that case, a supermarket manager had acted abusively towards other employees, took a company-mandated leave of absence, and was diagnosed with depression and anxiety.²³⁰ The court observed that a manager had asked the plaintiff if he was having "problems," that the company had encouraged him to seek help from its Employee Assistance Program, and that the company had received doctors' reports in connection with a workers' compensation claim and the leave of absence diagnosing the employee with depression, anxiety, and stress.²³¹ Based on this evidence, the court asserted that a reasonable trier of fact could conclude that the employer regarded Holihan as substantially limited in his ability to work.²³²

²²⁴ E.g., *Holihan v. Lucky Stores*, 87 F.3d 362 (9th Cir. 1996).

²²⁵ *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995).

²²⁶ See SEPTEMBER 1999 EEOC INSTRUCTIONS, *supra* note 199.

²²⁷ *Id.*

²²⁸ 87 F.3d 362 (9th Cir. 1996).

²²⁹ *Id.* at 366-67.

²³⁰ *Id.* at 364-65.

²³¹ *Id.* at 366.

²³² *Id.*; see also *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 444 (E.D. La. 1994) (criticizing an employer for interpreting an employee's illness in "layman's terms" and ruling that a jury could conclude that this interpretation evidenced a belief "that Stradley was not fit to work in any job"). But see Risa M. Misb, "Regarded As Disabled"

The "regarded as" prong might be particularly useful to a mentally ill employee who returns from a leave of absence and is either harassed or treated differently than his coworkers. For instance, it is not uncommon for a supervisor to probe such an employee's work for mistakes and to record errors with unusual formality.²³³

b. *Problems with "Regarded as"*

Based on the legislative history of the Act, the EEOC stated:

[I]f an individual can show that an employer . . . made an employment decision because of a perception of a *disability* based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.²³⁴

Read in tandem with the language of the statute, this statement dictates that a plaintiff must prove that her employer perceived that she suffered from an impairment that substantially limited a major life activity.²³⁵ That is, we must assume the word "disability" in the EEOC directive is tantamount to an ADA-defined disability.²³⁶

This standard of proof is particularly difficult because the majority of "regarded as" plaintiffs assert that their employers regarded them as substantially limited in the major life activity of working.²³⁷ Thus, in order for a plaintiff to survive summary judgment, courts generally require proof that the employer based its actions upon a perception that the employee is barred from a variety of jobs.²³⁸ Put

Claims Under the ADA: Safety Net or Catch-All?, 1 U. PA. J. LAB. & EMP. L. 159, 171-74 (1998) (criticizing the *Holihan* decision). Mish argues that a "regarded as" plaintiff must meet three requirements: (1) the perceived impairment would substantially limit a major life activity, and not simply prevent the individual from performing a subset of jobs; (2) the individual can, in fact, perform the essential functions of the job in question; and (3) the employer's action gave rise to an inference of discrimination. *Id.* at 175.

²³³ *E.g.*, *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 304-06 (3d Cir. 1999) (explaining that upon return from leave, supervisor immediately increased employee's workload, saved letters with typos, and photographed employee's desk and trash can).

²³⁴ 29 C.F.R. pt. 1630, app. § 1630.2(l) (2000) (emphasis added).

²³⁵ Eichhorn, *supra* note 50, at 1467.

²³⁶ In fact, the most definite statement in the legislative history on this point supports such a reading. The House Report states: "This test is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity." H.R. REP. NO. 101-485, pt. 3, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452.

²³⁷ See Mayerson, *supra* note 27, at 598.

²³⁸ See *Loeckle v. State Farm Auto. Ins. Co.*, 59 F. Supp. 2d 838, 855 (N.D. Iowa 1999) (distinguishing *Holihan* as a case in which "the employer was aware of a condition that would or could substantially impair the plaintiff's ability to work at any job"); see also Locke, *supra* note 138, at 145 (arguing that courts should not require plaintiffs to prove that "an employer erroneously perceived them to be unable to work generally in a type of employ-

another way, evidence that the employer displayed hostility towards the plaintiff because of his condition, or even evidence that this hostility prompted termination, might not be sufficient to create an issue of fact under the "regarded as" prong.²³⁹

Many courts have also observed that evidence of an employer voicing concerns about an employee's mental health is, without more, insufficient to prove that the employer regarded the individual as disabled.²⁴⁰ Courts have reached the same conclusion when an employer requests that the individual see a psychologist²⁴¹ or when it offers a leave of absence.²⁴² In fact, some courts have looked to an employer's request that an employee receive a psychological evaluation as strong evidence that the employer did *not* regard an employee as mentally disabled; these evaluations are "reasonable means to ascertain the cause of troubling behavior."²⁴³ Courts have also typically not held an employer accountable merely by evidence that it had previously extended accommodations to an employee.²⁴⁴ By punishing these actions, courts would discourage flexibility among managers who informally grant privileges that increase workforce morale.²⁴⁵

ment"); Mayerson, *supra* note 27, at 599 (noting further that "[a] plaintiff can produce evidence of how he or she was treated, not what the employer 'perceives'").

²³⁹ See *Robb v. Horizon Credit Union*, 66 F. Supp. 2d 913, 919 (C.D. Ill. 1999) (suggesting also that an employer that regards an employee as suffering from a substantially limiting impairment will not be liable unless it also regards that impairment as permanent).

²⁴⁰ *E.g.*, *Cody v. Cigna Healthcare*, 139 F.3d 595, 599 (8th Cir. 1998) (noting employers' right to "ascertain the cause of troubling behavior without exposing themselves to ADA claims").

²⁴¹ *E.g.*, *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580-81 (N.D. Ala. 1996).

²⁴² *E.g.*, *Sullivan v. River Valley Sch. Dist.*, 20 F. Supp. 2d 1120 (W.D. Mich. 1998); *Kocsis v. Multi-Care Mgmt. Inc.*, 1996 FED App. 330P (6th Cir.), 97 F.3d 876, 885. *But see* *Derbis v. U.S. Shoe Corp.*, Civ. A. No. MJG-93-130, 1994 WL 631155, *5 (D. Md. Sept. 7, 1994) (declaring that employer's alleged suggestion that plaintiff apply for long-term disability leave raised an issue of fact as to whether employer regarded plaintiff as unemployable), *aff'd*, 67 F.3d 294 (4th Cir. 1995) (unpublished table decision).

²⁴³ *Sullivan*, 20 F. Supp. 2d at 1125 (quoting *Cody*, 139 F.3d at 599). The *Sullivan* court also noted that, even assuming that the employer regarded the plaintiff as disabled, the requested psychological evaluation was nondiscriminatory, that is, job-related and consistent with business necessity. *Id.* at 1126-27; *see also* *Hawkins v. Microfibres, Inc.*, No. 1:94CV86-S-D, 1995 U.S. Dist. LEXIS 21611, at *13-14 (N.D. Miss. 1995) (stating that an employer's referral of an employee to Employee Assistance Program should not necessarily give rise to a "regarded as" cause of action).

²⁴⁴ *E.g.*, *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 189-90 (3d Cir. 1999).

²⁴⁵ *E.g.*, *Kvintus v. R.L. Polk & Co.*, 3 F. Supp. 2d 788, 795 (E.D. Mich. 1998) (accepting that an offer of "time off" did not display discriminatory animus and that "there is nothing improper or illegal about offering a plaintiff an 'accommodation'"). Some courts have even suggested that an employer's refusal to accommodate might support its defense that it did not regard an employee as disabled. *Deane v. Pocono Med. Ctr.*, No. 96-7174 (3d Cir. Aug. 25, 1997), *remanded*, 142 F.3d 138 (3d Cir. 1998) (en banc); *see* John M. Vande Walle, Note, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI-KENT L. REV. 897, 920

3. *Reasonable Accommodations for "Record of" and "Regarded as" Plaintiffs*

Many of the plaintiffs who will now bring "regarded as" or "record of" claims will seek the reasonable accommodations that, prior to *Sutton*, they might have been afforded under the first prong of the disability definition. The circuits are apparently split concerning the availability of accommodations for "regarded as" plaintiffs.²⁴⁶ As a practical matter, however, it makes little sense to offer this remedy to anyone who is not "actually disabled."²⁴⁷ Although the following discussion focuses on the "regarded as" prong, the analysis applies equally to the issue of accommodating individuals under the "record of" prong.

a. *Support for Accommodating "Regarded as" Plaintiffs*

According to its plain meaning, the ADA provides for accommodations for "regarded as" individuals. The statute forbids "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."²⁴⁸ Because an individual who is "regarded as" having or has a "record of" a substantially limiting impairment is an individual with a disability,²⁴⁹ the statute seems to demand reasonable accommodations for that individual's current limitations.²⁵⁰

From this premise, some plaintiffs have argued that a "failure to mandate reasonable accommodations for 'regarded as' plaintiffs would undermine the role the ADA plays in ferreting out disability discrimination in employment."²⁵¹ That is, merely reprimanding the employer for its misperception will not effectively eliminate the "socially constructed and reinforced" stereotypes.²⁵²

(1998) ("In some circumstances, the employer's refusal to provide accommodation can serve as evidence that the employer did *not* perceive that the plaintiff was disabled.").

²⁴⁶ Compare *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) ("[B]oth the language and policy of the statute seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so."), with *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999) (holding that "'regarded as' disabled plaintiffs are not entitled to reasonable accommodations").

²⁴⁷ Although this issue is by no means limited to mental illness cases, because of the prevalence of those claims and the distinct modes of accommodation related thereto, I believe it is important to address the issue in this paper.

²⁴⁸ 42 U.S.C. § 12112(b)(5)(A) (1994).

²⁴⁹ *Id.* § 12102(2).

²⁵⁰ In *Deane v. Pocono Medical Center*, 142 F.3d 138, 148 (3d Cir. 1998) (en banc), the court raised this issue but refused to decide it.

²⁵¹ *Id.* at 148 n.12.

²⁵² *Id.* at 148-49 n.12.

The First Circuit, in *Katz v. City Metal Co.*,²⁵³ apparently held that "regarded as" plaintiffs are entitled to accommodations.²⁵⁴ In the most relevant section, the court stated:

Congress, when it provided for perception to be the basis of disability status, probably had principally in mind the more usual case in which a plaintiff has a long-term medical condition of some kind, and the employer exaggerates its significance by failing to make a reasonable accommodation. But both the language and policy of the statute seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so.²⁵⁵

The First Circuit left to the jury the question of whether Katz would have been able to perform his job if his employer had granted his request for accommodation.²⁵⁶

The *Katz* court has been criticized for its characterization of the "usual case" Congress anticipated.²⁵⁷ Its reading of congressional intent, however, would provide exactly what mentally impaired employees are looking for—the notion that a mentally ill individual might not be so limited if she was accepted and accommodated by her employer. One commentator who supports this reading of the statute stated that "where an individual is being denied an employment opportunity because of an erroneous perception, the ADA should require the employer to consider whether a reasonable accommodation could remove that barrier to employment."²⁵⁸

²⁵³ 87 F.3d 26 (1st Cir. 1996).

²⁵⁴ *Id.* at 33.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 34; see *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999) (discussing *Katz*); Michael D. Moberly, *Letting Katz Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 614 (1998) (stating that *Katz* intimated that "regarded as" plaintiffs are entitled to accommodations). Compare *Weber*, 186 F.3d at 917 (holding that "'regarded as' disabled plaintiffs are not entitled to reasonable accommodations"), with *Spath v. Berry Plastics Corp.*, 900 F. Supp. 893 (N.D. Ohio 1995) (stating that a "regarded as" plaintiff should be accommodated).

²⁵⁷ See *Deane v. Pocono Med. Ctr.*, No. 96-7174, slip op. at 25 (3d Cir. Aug. 25, 1997) (noting that the employer's failure to accommodate "becomes relevant . . . only after the individual is found to be disabled"), *remanded*, 142 F.3d 138 (3d Cir. 1998) (en banc).

²⁵⁸ Moberly, *supra* note 256, at 637-38 (reasoning that the goal of the ADA "is to remove barriers that prevent protected class members from enjoying the same employment opportunities as other persons" (citation omitted)); see also *Sradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 444 (E.D. La. 1994) (noting, in a "regarded as" case, that although plaintiff was unable to work without accommodation at the time of termination, a factual issue remained as to whether plaintiff could perform essential functions of his job with an accommodation).

A policy argument can also be made in favor of accommodating "regarded as" plaintiffs. The specter of having to accommodate perceived disabilities will increase the likelihood that truly disabled individuals are accommodated without resort to litigation. One author discussed the "regarded as" prong in terms of its "prophylactic justification" be-

b. *Denying Accommodations to "Regarded as" Plaintiffs*

It is important to recognize the parallels between the protections of the ADA "regarded as" prong and those of other federal civil rights laws. Title VII does not, however, provide accommodations for victims of race or gender discrimination because the statute presumes that such individuals can perform the jobs and only need to be rescued from the stereotypical or bigoted attitudes that block their entrance.²⁵⁹ Similarly, the ADA should not accommodate those who are "regarded as" disabled.

The ADA, like Title VII, provides that once the statute removes the societal barriers to employment, "regarded as" disabled individuals can operate as well as anyone else.²⁶⁰ It would be antithetical to allow the "regarded as" plaintiff to assert that she is not substantially limited in any major life activity and then to request the accommodation provided for those who are so limited.

The Third Circuit described the "regarded as" plaintiff as *statutorily* disabled—disabled not by his impairment, but by fears and misperceptions.²⁶¹ "To compensate for a statutory disability, then, the employer need only be dispossessed of its misperception as it is that which renders the employee disabled."²⁶² To the contrary, those who are substantially limited receive accommodations for the impairment "which actually renders . . . [the person] disabled."²⁶³

Along these lines, however, the disparity between Justice O'Connor's reading of the third prong in *Sutton*²⁶⁴ and that of the EEOC²⁶⁵ raises questions. Justice O'Connor stated that "[t]here are two apparent ways in which individuals may fall within this statutory definition"—if the individual has no impairment but is regarded as disabled, or if the individual's impairment is not substantially limiting but is perceived to be so by the employer.²⁶⁶ This interpretation ignores the third construction offered by the EEOC, which it culled

cause it prevents "spillover discrimination." See Vande Walle, *supra* note 245, at 933. Thus, the "regarded as" prong could act as a deterrent.

²⁵⁹ See *Deane*, No. 96-7174, slip op. at 23.

²⁶⁰ See *id.*

²⁶¹ See *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144-45 (3d Cir. 1998) (en banc).

²⁶² *Id.*; see also Allen Dudley, Comment, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for "Regarded as" Disabled Individuals*, 7 GEO. MASON L. REV. 389, 412 (1999) (stating that "the only reasonable accommodation that Congress envisioned was tolerance").

²⁶³ *Deane*, No. 96-7174, slip op. at 22.

²⁶⁴ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999).

²⁶⁵ See 29 C.F.R. § 1630.2(l) (2000).

²⁶⁶ *Sutton*, 527 U.S. at 489.

from the legislative history,²⁶⁷ and the Court's own statements in *Arline*.²⁶⁸ That is, one might be substantially limited "only as a result of the attitudes of others toward [the] impairment."²⁶⁹

If one recognizes this construction, the argument in favor of accommodation gains practical support. If an individual is unable to perform the essential functions of her job because her coworkers or customers entertain antiquated fears or preconceptions relating to her impairment, she might be substantially limited in a major life activity. Presumably, the Supreme Court considered this when it stated: "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."²⁷⁰ Thus, because a case of "collective discriminatory perceptions"²⁷¹ seems closer to an actual disability, a court might be more apt to accommodate the individual, especially if the limitation arises out of workplace perceptions of the individual by coworkers or customers.²⁷²

Although the Supreme Court has not explicitly addressed this issue, one might argue that the decision in *Arline* tacitly endorsed accommodating at least some perceived disabilities. *Arline*'s case came before the Court after the Court of Appeals found *Arline* disabled under the statute.²⁷³ The Eleventh Circuit had remanded for a finding of whether *Arline* was "otherwise qualified," and if not, whether the employer could reasonably accommodate her.²⁷⁴ By affirming the lower court, the Supreme Court arguably endorsed reasonable accommodations for "record of" and "regarded as" plaintiffs.²⁷⁵ Nonethe-

²⁶⁷ See S. REP. NO. 101-116, at 23 (1989) (listing three alternative constructions of the "regarded as" prong); H.R. REP. NO. 101-485, pt. 3, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452 (same).

²⁶⁸ See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987) (noting that even though an impairment might not affect a person's abilities, it could "substantially limit that person's ability to work as a result of the negative reactions of others to the impairment").

²⁶⁹ 29 C.F.R. § 1630.2(l)(2). Some commentators have noted that "[t]his interpretation does not coincide with the literal language of the statute, which requires that one be regarded as having an impairment, that, in itself, substantially limits a major life activity." Eichhorn, *supra* note 50, at 1433 (asserting, however, that the regulation is consistent with the legislative intent).

²⁷⁰ *Arline*, 480 U.S. at 489.

²⁷¹ *Leading Cases*, *supra* note 212, at 348 (stating that such claims should fall under the third prong rather than the first prong, but expressing concern that employers might be punished for perceptions that are not their own).

²⁷² See Moberly, *supra* note 256, at 620-22. Of course, the method of accommodation in this area poses difficult questions. If discriminatory misperceptions abound—for instance, if coworkers refuse to cooperate with a mentally ill employee—the accommodation would need to break down those misperceptions rather than fuel them. This would certainly present a significant challenge to the employer.

²⁷³ *Arline*, 480 U.S. at 277.

²⁷⁴ *Id.*

²⁷⁵ See *id.*

less, even if courts recognized the possibility of accommodating this type of perceived disability, a plaintiff's chances of success would be slim. As one commentator explained, the prejudice might need to be so widespread "as to make the individual unemployable."²⁷⁶

The Eighth Circuit is the only Court of Appeals to reject accommodations for "regarded as" plaintiffs.²⁷⁷ In *Weber v. Strippit*,²⁷⁸ the plaintiff claimed that his employer discriminated against him by failing to provide a reasonable accommodation for his perceived disability.²⁷⁹ In response, the court stated that although "[t]he reasonable accommodation requirement is easily applied in a case of an actual disability," the "requirement makes considerably less sense in the perceived disability context" and "would lead to bizarre results."²⁸⁰ The court wrote:

[The Act] cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.²⁸¹

4. The Future for "Record of" and "Regarded as" Claims

Assuming that "regarded as" or "record of" plaintiffs cannot obtain accommodations, the courts are left with significant questions

²⁷⁶ Mayerson, *supra* note 27, at 597. Scholars who discuss the notion of one being substantially limited as a result of the attitudes of others often refer to the plight of burn victims or individuals with severe facial scars. These people might be rejected from their jobs because of a fear of adverse customer reactions. *E.g.*, H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453 (noting that burn victims may be covered "because of the attitudes of others . . . even if [fire victims] did not view themselves as 'impaired'"). It is less likely, however, that an employer would entertain the same fears concerning a "hidden" impairment like mental illness.

²⁷⁷ See *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999). The Third Circuit's decision in *Deane v. Pocono Medical Center*, No. 96-7174 (3d Cir. Aug. 25, 1997), is not binding law because, on rehearing, the en banc court did not reach the issue of accommodations, 142 F.3d 138, 148-49 n.12 (3d Cir. 1998) (en banc). Thus, the potential circuit split on the issue lies between the Eighth and First Circuits. For additional support for the *Weber* holding, see *id.* at 148 (noting, however, the significance and difficulty of the issue, and that the employer's argument against accommodations had "considerable force"); see also *Matlock v. City of Dallas*, Civ. A. No. 3:97-CV-2735-D, 1999 WL 1032601 (N.D. Tex. Nov. 12, 1999) (holding "regarded as" plaintiff is precluded from reasonable accommodation claim); *Balliett v. Heydt*, Civ. A. No. 95-5184, 1997 U.S. Dist. LEXIS 14913, at *17-*19 (E.D. Pa. Sept. 25, 1997) (finding plaintiff not "regarded as" mentally disabled and stating that even if plaintiff were "regarded as" disabled, he did not present evidence that he could perform the essential functions of the position without accommodation); *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 475 (N.D. Tex. 1997) (same).

²⁷⁸ *Weber v. Strippit, Inc.*, 186 F.3d 917 (8th Cir. 1999).

²⁷⁹ See *id.* at 915.

²⁸⁰ *Id.* at 916.

²⁸¹ *Id.* at 917.

concerning appropriate remedies. Imagine a typical situation: an employer terminates a depressed employee for poor performance. Because her medication partially controls her symptoms, she is not substantially limited in any major life activity. Due to remarks by her superior and other evidence, however, the court determines that the individual was "regarded as" disabled by the employer. The court orders reinstatement and back wages, but does not require the employer to accommodate the employee in any way. The employee returns to work, continues to have problems, and is terminated once again.

Ultimately, the employer gets what it initially wanted—the dismissal of a "problem employee"—but only after losing in court. Yet, the employee "suffers the very fate she was suing to avoid . . . but does so only after winning her case."²⁸² This time, the employee cannot bring an ADA claim: the first case determined that she is not disabled, and the employer, after losing in that case, certainly does not regard her as disabled according to the ADA definition.

Some have argued, nevertheless, that the "mischief" of the statute has been cured through back pay and reinstatement.²⁸³ However, reinstatement, which only comes after tremendous litigation costs, might make matters worse. Courts should recognize this conundrum and explore other avenues of relief. One solution might be an award of "front pay." This would give the plaintiff an opportunity to seek alternative employment and eliminates the possibility of future entanglements between the parties.²⁸⁴ Plus, the employer is now aware of the myths and stereotypes of the illness. Hopefully, in the future, the employer will make minor accommodations to avoid litigation.²⁸⁵

In conclusion, however, a word of caution: the "regarded as" prong might become obsolete for the mentally ill plaintiff. In *Sutton*, the Supreme Court expressed serious doubts as to whether "working" should be included among the major life activities covered by the ADA.²⁸⁶ The Court, though, did not decide the issue because it was

²⁸² *Deane*, No. 96-7174, slip op. at 41 (Becker, J., dissenting) (discussing a similar scenario).

²⁸³ *See id.* (Becker, J., dissenting).

²⁸⁴ *See* *Farley v. Nationwide Ins. Co.*, 197 F.3d 1322, 1338-40 (11th Cir. 1999) (upholding trial court's award of front pay in lieu of reinstatement in "special circumstances" when reinstatement is "not feasible" due to hostility in the workplace); *see also* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-95 (1983) (discussing problems with reinstatement and back pay in the union setting and noting that among reinstated employees, "nearly 80% were gone within a year or two").

²⁸⁵ *See Deane*, No. 96-7174, slip op. at 42 (Becker, J., dissenting).

²⁸⁶ *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (noting that "there may be some conceptual difficulty in defining 'major life activities' to include work"); *cf.* *EEOC Guidances Under Scrutiny*, ADA UPDATE (NYPER Publications, Latham, N.Y.), Aug. 1999, at 30 (stating that in light of *Sutton*, "[a]ll EEOC definitions are now questionable" (internal quotation marks omitted)).

not raised.²⁸⁷ Therefore, since most perceived disability claims by mentally ill individuals concern the major life activity of working, plaintiffs might become even more limited in the future.²⁸⁸

C. Major Life Activities (Other than Working)

Although the *Sutton* Court did not eviscerate the major life activity of working, its guarded analysis of that issue²⁸⁹ should curtail its already diminished effectiveness in the lower courts. Thus, mentally ill plaintiffs will likely begin to emphasize other major life activities.²⁹⁰ For instance, as noted above, in conjunction with evidence regarding the effects of their medications, plaintiffs have already begun to explore problems with sleeping, thinking, and interacting with others.²⁹¹

In *McAlindin v. County of San Diego*²⁹² the Ninth Circuit held that sleeping, engaging in sexual relations, and interacting with others are major life activities,²⁹³ providing plaintiffs with the most promising mental illness ruling since *Sutton*. Although *McAlindin* apparently did not specifically raise the "interacting with others" issue,²⁹⁴ the majority declared that "[b]ecause [it] . . . is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'"²⁹⁵ The court qualified its holding, however, and maintained that "[r]ecognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited."²⁹⁶ In sum, the court wrote, "a plaintiff must show that his 'relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.'"²⁹⁷

Thus, under the majority's strict definition, only plaintiffs with very serious interpersonal limitations could proceed beyond summary judgment. It is unlikely, however, that "interacting with others," as

²⁸⁷ *Sutton*, 527 U.S. at 492.

²⁸⁸ See Starr & Constantine, *supra* note 171, at 512.

²⁸⁹ See *supra* Part II.A.

²⁹⁰ Cf. Blair, *supra* note 122, at 1400-01 (suggesting this prior to the *Sutton* decision).

²⁹¹ For an extensive list of possible limitations in major life activities for mentally ill individuals, see Judge David L. Bazelon Center for Mental Health, *List of Limitations on Major Life Activities*, at <http://www.bazelon.org/lmtslist.html> (Aug. 11, 1999) and Boston University Research Center for Psychiatric Rehabilitation, *How Does Mental Illness Affect the Way I Function at Work?*, at <http://www.bu.edu/sarpsych/jobschool/functemp.htm> (last visited Feb. 28, 2001).

²⁹² 192 F.3d 1226 (9th Cir. 1999).

²⁹³ *Id.* at 1233.

²⁹⁴ See *id.* at 1240 (Trott, J., concurring in part and dissenting in part).

²⁹⁵ *Id.* at 1234.

²⁹⁶ *Id.* at 1235.

²⁹⁷ *Id.* at 1234 (quoting *EEOC Psychiatric Guidance*, *supra* note 35, at 2334).

such, will make great inroads,²⁹⁸ for it automatically raises the catch-22 of disability and qualification.

The *McAlindin* court's recognition of sexual functioning as a major life activity is also groundbreaking. If the plaintiff was substantially limited in his ability to function sexually—even if caused entirely by psychotropic medications—then his panic disorder would rise to the level of a disability. However, unlike the plaintiff in *Taylor v. Phoenixville School District*,²⁹⁹ whose medication-induced nausea indirectly affected her ability to think,³⁰⁰ this plaintiff's ability to function sexually was unrelated to his work performance.³⁰¹

Finally, the Ninth Circuit's recognition of sleeping as a major life activity might assist future mentally ill plaintiffs. Other courts, however, have been more restrictive in this area. For example, in *Kvintus v. R.L. Polk & Co.*,³⁰² the plaintiff suffered from post-Vietnam stress disorder and claimed that his disorder caused a "lack of sleep."³⁰³ Specifically, the plaintiff claimed that he had slept less than four hours a night for more than thirty years.³⁰⁴ Interestingly, the court, and presumably the plaintiff, did not phrase the major life activity in terms of "sleeping" alone, which is recognized in *EEOC Psychiatric Guidance*.³⁰⁵ Instead, the court observed that the "plaintiff . . . [has not]

²⁹⁸ In general, courts have read claims concerning "interacting with others" very narrowly. See, e.g., *Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 499 (10th Cir. 2000) (holding that plaintiff presented insufficient evidence); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 & n.2 (1st Cir. 1997) (holding that EEOC Psychiatric Guidance on "interacting with others" is "hardly binding" and stating in dicta that "[t]he concept . . . is remarkably elastic, perhaps so much so as to make it unworkable as a definition"); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 527 (7th Cir. 1996) (finding that plaintiff, who was classified with a stress disorder, was only unable to work with a particular supervisor); *Schneider v. Fortis Ins. Co.*, 200 F.3d 1055, 1062 (7th Cir. 2000) (reiterating *Weiler's* holding that "a personality conflict between an employee and a supervisor—even one that triggers the employee's depression—is not enough to establish that the employee is disabled, so long as the employee could still perform the job under a different supervisor").

²⁹⁹ 184 F.3d 296 (3d Cir. 1999) (discussed *supra* notes 194-98 and accompanying text).

³⁰⁰ *Id.* at 308-09.

³⁰¹ See *McAlindin*, 192 F.3d at 1234. The notion of sexual functioning as a major life activity could raise further issues. First, a court might attempt to distinguish sexual functioning from the major life activity of "reproduction," which the Supreme Court recognized in *Bragdon v. Abbott*, 524 U.S. 624, 637-638 (1998). Second, if a court does recognize a disability based on a substantial limitation in sexual functioning, what sort of reasonable accommodation would it have to provide? The plain language of the statute could be interpreted to indicate that once an employee meets the disability threshold, he can request an accommodation for any job-related limitation, whether or not it is a "substantial" limitation. See 42 U.S.C. § 12112(b)(5)(A) (1994). In fact, some experts recommend that plaintiffs avoid claims based on "major life activities that are strongly related to work performance." Judge David L. Bazelon Center for Mental Health, *The Supreme Court's 1999 ADA Decisions*, at <http://www.bazelon.org/sct99ada.html> (May 30, 2000).

³⁰² 3 F. Supp. 2d 788 (E.D. Mich. 1998).

³⁰³ *Id.* at 794.

³⁰⁴ See *id.*

³⁰⁵ *EEOC Psychiatric Guidance*, *supra* note 35, at 16.

demonstrated *how* his 'lack of sleep' has interfered with plaintiff's ability to sustain gainful employment. . . . In short, the Court does not believe that plaintiff has shown how his 'loss of sleep' equates with interference with a major life activity."³⁰⁶ Perhaps plaintiffs will achieve more success by asserting limitations in the ability to sleep apart from work-related limitations.³⁰⁷

V

CONCLUSION: AN ALTERNATIVE SCHEME

In *Sutton*, the Supreme Court curtailed the ability of mentally ill individuals to proceed beyond summary judgment on ADA employment claims. As explained in Part IV, mentally ill plaintiffs seeking accommodations under the first prong of the disability definition will likely begin to address major life activities other than working. They will also force courts to examine the side effects of their medications and any limitations not fully controlled by those medications.

Notwithstanding the *Sutton* ruling, many plaintiffs will turn to the second and third prongs of the disability definition. After *Sutton*, however, the "regarded as" portion of the statute remains unworkable, particularly in the realm of mental illness; the case law is extremely inconsistent and, for the most part, plaintiffs have been unsuccessful due to the difficult evidentiary burdens brought about by a plain reading of the ADA.³⁰⁸ The remainder of this Note critiques and augments arguments for reform proposed by other authors and will ultimately offer an alternative statutory scheme for the ADA employment provisions. The new language recognizes the practical employer concerns underlying *Sutton*,³⁰⁹ but also gives effect to the ADA's mantra that individuals who can "do the job" should be unimpeded by societal misperceptions. In doing so, this Note attempts to provide better guidance for the courts and a more predictable system for mentally ill plaintiffs and their employers.³¹⁰

³⁰⁶ *Kvintus*, 3 F. Supp. 2d at 795 (emphasis added); see *EEOC Psychiatric Guidance*, *supra* note 35.

³⁰⁷ *But see Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 498 (10th Cir. 2000) (noting that excessive sleepiness due to side effects of medication did not establish substantial limitation in ability to sleep); *Tedeschi v. Sysco Foods, Inc.*, No. Civ. A. 99-3170, 2000 WL 1281266, at *5 (E.D. Pa. Sept. 1, 2000) (holding that medication controlled sleep problems).

³⁰⁸ See *Eichhorn*, *supra* note 50, at 1433 & n.168 (stating that "the convoluted statutory language does little to inform potential litigants" and courts about the coverage under the "regarded as" prong).

³⁰⁹ For example, the *Sutton* Court indicated that employers should have the freedom to establish job criteria based on medical conditions. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999).

³¹⁰ Of course, this new statutory language would prove useful for courts and plaintiffs in all ADA cases. See *supra* notes 3-8 and accompanying text.

A. The Source of the Problem

Professor Robert Burgdorf³¹¹ explained that Congress encountered a problem when it tried to apply a single definition to the non-discrimination edict of Section 504 of the Rehabilitation Act and to the affirmative action requirements under Sections 501 and 503.³¹² He contends that the first prong of the Rehabilitation Act definition was written in "restrictive" terms, so as to ensure that government contractors could not receive credit for employing moderately impaired individuals.³¹³ Nevertheless, Congress reapplied this restrictive definition to the third prong of the ADA definition, "which [is] expansive in scope" and aimed to cure a broad array of discriminatory attitudes.³¹⁴

Thus, courts have often created "illogical and insurmountable" burdens of proof for "regarded as" plaintiffs³¹⁵—demanding evidence that an employer regarded an individual as suffering from an impairment that substantially limits a major life activity.³¹⁶ This burden has proven particularly troublesome for mentally ill plaintiffs who most often utilize the major life activity of working and therefore must prove their employer regarded them as unable to perform a broad class of jobs.³¹⁷

B. Legislative Intent Behind the "Regarded as" Prong

With the "regarded as" prong of the disability definition, Congress intended to protect individuals who are denied employment opportunities "because of the myths, fears and stereotypes associated with disabilities."³¹⁸ The legislative history gives examples of these common "attitudinal barriers," including "concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by coworkers and customers."³¹⁹ Finally, the legislative history suggests that one does not need to prove

³¹¹ Professor Burgdorf drafted the original ADA bill introduced to Congress in 1988. Burgdorf, *supra* note 4, at 409 n.*.

³¹² *Id.* at 528; see generally *supra* notes 22-25 and accompanying text.

³¹³ See Burgdorf, *supra* note 4, at 528; see also Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 184-85 (1999) (discussing Burgdorf's theories).

³¹⁴ See Burgdorf, *supra* note 4, at 432.

³¹⁵ See Harkin Brief, *supra* note 200, at 17.

³¹⁶ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999); see also Eichhorn, *supra* note 50, at 1432-33 (noting that a "regarded as" plaintiff must show a physical or mental impairment that substantially limits a major life activity).

³¹⁷ See Bales, *supra* note 47, at 232-33.

³¹⁸ See H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452-53.

³¹⁹ *Id.* at 30, reprinted in 1990 U.S.C.C.A.N. 445, 453.

an employer "articulate[d] one of these concerns" in order to gain coverage under the "regarded as" prong.³²⁰ Instead,

if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.³²¹

C. Giving Adequate Protection Through Separate Definitions

The current three-prong system makes sense. However, those seeking employment accommodations for "actual disabilities" should meet a more difficult burden of proof than those who claim to be victims of stereotypical misperceptions. Therefore, Congress should clearly delineate the three prongs in Title I, providing a separate definition in place of the current "regarded as" prong.³²²

1. *Maintaining the Current Definition for Plaintiffs Seeking Reasonable Accommodations*

Many commentators encourage a full overhaul of the disability definition.³²³ In general, these scholars believe ADA litigation should focus on the employer's actions and motivation rather than on

³²⁰ See *id.*, reprinted in 1990 U.S.C.C.A.N. 445, 453.

³²¹ *Id.* at 30-31, reprinted in 1990 U.S.C.C.A.N. 445, 453. Based on this language, Arlene Mayerson suggested:

If the employer refused to hire an individual based on an actual or perceived physical or mental impairment, it must be presumed that the employer regarded the plaintiff as disabled. This is the only approach that promotes the intent of the ADA—to ensure that job criteria based on physical or mental impairments are "job-related."

Mayerson, *supra* note 27, at 597.

Congress also considered controlled impairments. The Senate Report states: "Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions." S. REP. NO. 101-116, at 24 (1989). The use of the word "condition" instead of "disability" in the passages above could suggest that Congress intended to ease the standard of proof in "regarded as" cases. This reading, however, would undermine the clear language of the statute, see 42 U.S.C. § 12101 (2) (1994), and the most definite statement in the legislative history on this point. See H.R. REP. NO. 101-485, pt. 3, at 29, reprinted in 1990 U.S.C.C.A.N. 445, 451-52. Nevertheless, Mayerson and others have used this alternative language to suggest that a plaintiff must only prove that his employer took action based on an impairment, not a "disability," in order to satisfy the "regarded as" prong. Although I sympathize with Mayerson's goals in this area, the current statutory language simply cannot withstand such a construction. Indeed, the inconsistent terminology used in the reports demonstrates one of the problems with resorting to legislative history in statutory interpretation. For my attempted resolution of this issue, see *infra* Part V.C.2.

³²² Cf. Friedland, *supra* note 313, at 194-97 (proposing a separate set of standards for actual versus perceived disabilities).

³²³ See Burgdorf, *supra* note 4, at 568-72; Eichhorn, *supra* note 50, at 1473-74; Friedland, *supra* note 313, at 173.

whether the employee is "truly disabled."³²⁴ They argue that the courts treat the disabled as "a specific protected class,"³²⁵ when in actuality, disability is only a societal creation—a group that has been "singled out" and "treated differently."³²⁶ Therefore, in order to embrace the broad class that they believe Congress intended to protect, some commentators suggest a statutory ban on employment decisions that are based on mental and physical impairments and are not supported by business necessity.³²⁷

Although these recommendations might alter the initial focus of ADA inquiry, they do not answer the ultimate question of what limitations should be accommodated. In her depiction of an amended statutory definition, Lisa Eichhorn anticipates this criticism.³²⁸ She contends that accommodations are not a form of special treatment but rather "provide an equal opportunity to a person with a disability."³²⁹

Under this scheme, however, we would still need to ask who is *disabled enough* to require a leveled playing field and which limitations affect job performance to the point where accommodations should be provided. Eichhorn herself explains that her expanded definition would cover individuals with impairments that do not substantially limit major life activities.³³⁰ She reasons, however, that if an individual's major life activities are not so limited, then that person's job abilities would also not be limited by her impairment.³³¹ Hence, no accommodation would be required.³³² In the end, however, we still ask the basic question: Is this individual impaired enough to warrant an accommodation? Therefore, the current "restrictive" definition of disability should continue to apply to claimants seeking reasonable accommodations.

This is not to say that the current disability definition functions as it should. Assuming that line drawing of some sort is inevitable in the realm of accommodations, an amended definition should make certain that those who do not require accommodations can still employ

³²⁴ See Burgdorf, *supra* note 4, at 571-72; Eichhorn, *supra* note 50, at 1472-73.

³²⁵ Eichhorn, *supra* note 50, at 1473.

³²⁶ Burgdorf, *supra* note 4, at 528.

³²⁷ See Bales, *supra* note 47, at 245; Eichhorn, *supra* note 50, at 1473-74.

³²⁸ Eichhorn, *supra* note 50, at 1476-77.

³²⁹ *Id.* at 1476; see also Diller, *supra* note 122, at 23 (noting that courts should not view the ADA as social welfare or subsidy program, but as a "mandate for equality"); *id.* at 40 (comparing the ADA's utilization of a form of differential treatment with that of traditional affirmative action plans); 9 LARSON ET AL., *supra* note 141, § 154.01 (stating that the Act's reasonable accommodation mandate does not "constitute required preferential treatment").

³³⁰ See Eichhorn, *supra* note 50, at 1476.

³³¹ See *id.*

³³² See *id.* at 1476-77.

the statute to combat discrimination. This can be accomplished by providing a separate set of rules for perceived limitations.

2. Preventing Discrimination Based on Stereotypical Attitudes

Under the current "regarded as" scheme, claimants have been forced to present evidence of the employer's perceptions in order to survive summary judgment.³³³ This is exceedingly difficult because most claimants assert that their employer regards them as substantially limited in their ability work.³³⁴ As such, a claimant must present evidence that his employer believed he was foreclosed from working in a class of jobs.³³⁵ It is not enough that the individual present evidence that his employer incorrectly regarded him as unfit for his position based on antiquated beliefs about the individual's impairment.³³⁶

Common sense might tell us that, in most cases, if an employer refuses to hire or terminates an employee based on a belief that the employee's impairment will prevent him from working at this employer's shop, then the employer probably also believes that the employee could not work anywhere else.³³⁷ With this in mind, Congress should remove the first prong considerations of major life activities, including working, and substantial limitations from third prong analysis.³³⁸

³³³ See Mayerson, *supra* note 27, at 598.

³³⁴ See *id.*

³³⁵ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999); see generally discussion *supra* Part IV.B.2(b).

³³⁶ See Burgdorf, *supra* note 4, at 573; Mayerson, *supra* note 27, at 590, 598-600; see also *Leading Cases*, *supra* note 212, at 347 (noting that a strict reading of the *Sutton* decision would render the "regarded as" prong ineffective).

³³⁷ See Bales, *supra* note 47, at 245 (arguing instead for a "once is enough" standard in "regarded as" claims); Brief of ACLU at 3, *Sutton* (No. 98-591) (stating that an employer that "takes an adverse employment action against an individual because of a physical or mental impairment necessarily regards that person as substantially limited in working" (emphasis added)); Harkin Brief, *supra* note 200, at 24-25. Senator Harkin's brief in the mitigating measures cases states:

It is not the rejection per se which gives rise to the "regarded as" claim, but the natural and ordinary implication of such a rejection. Usually, if an employer rejects an individual from a job because of the individual's impairment, it means the employer thinks the individual's impairment precludes the individual from doing the types of tasks the job requires. . . .

. . . .

. . . The only way to give meaning to the "regarded as" prong is to interpret the rejection from the job in question to signify the employer's view of the plaintiff's ability to perform the class of jobs to which the job in question belongs.

Id. at 24-25. But see *Sutton*, 527 U.S. at 489-90.

³³⁸ See Bales, *supra* note 47, at 245. As explained above, mentally ill plaintiffs asserting a limitation in the major life activity of working face considerable obstacles. Moreover, the *Sutton* decision solidified the difficult evidentiary burdens associated with such claims and also called into question the theory's applicability. In "actual disability" and "record of" cases, however, plaintiffs should retain the last-resort option of asserting the life activity of

Instead, the third prong should target employers who take adverse employment actions based on myths, fears, and stereotypes concerning disabilities. The third prong should denote three categories of discriminatory actions: (1) those in which the individual has no impairment³³⁹ at all but the employer, due to myths, fears, or stereotypes, takes an adverse action based on a belief that the individual has an impairment; (2) those in which the individual has a history of an impairment and the employer takes an adverse employment action based on myths, fears, or stereotypes associated with that impairment; and (3) those in which an individual currently has an impairment and the employer takes an adverse employment action based on myths, fears, or stereotypes associated with that impairment, whether those beliefs are held by the employer or by others. Accordingly, Congress should state that accommodations are only available for those who meet the requirements of the first prong's disability definition.³⁴⁰

Of course, the problem for past ADA plaintiffs has been the "protected class" requirement. Under the scheme this Note proposes, the plaintiff would have to demonstrate that he has a history of an ADA impairment, currently has such an impairment, or alternatively, that evidence exists demonstrating that his employer mistakenly believed he had such an impairment. This creates an inference that the employer based the adverse employment decision on myths, fears, or stereotypes.

The burden of production then shifts to the employer to present some legitimate, nondiscriminatory reason for the action.³⁴¹ Finally, the burden shifts back to the employee to prove that the employer's proffered reason was pretextual.³⁴²

working. For instance, if a plaintiff intends to use his physician-recommended leave of absence as evidence of a disability or a record of a disability, he might not be able to establish that he was substantially limited in his ability to care for himself. He might, however, be able to form a claim based on either a past or current limitation in the major life activity of working.

³³⁹ The EEOC definition of impairment would still apply. See 29 C.F.R. § 1630.2(h) (2000).

³⁴⁰ See explanation in *supra* Part IV.B.3(b).

³⁴¹ See *Olson v. Gen. Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996); see also H.R. REP. NO. 111-485, pt. 3, at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453 (explaining that if the employer does not "articulate [a] legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred").

³⁴² See *Olson*, 101 F.3d at 951.